91-154

No. ——

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
MAGGIO, INC.,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a suit against a union based on "some violence and public disorder" during the course of otherwise lawful labor picketing, the First Amendment forbids placing on the defendant-union the burden of proving that the plaintiff-employer's damages were the result of lawful picketing, and *not* the result of the misconduct.

2. Whether the Due Process Clause requires that a judge whose wife worked for an employer as a strike replacement during a labor dispute recuse himself in the employer's suit against a union for damages based on alleged misconduct directed against the replacements during that very dispute.

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PETITION FOR A WRIT OF CERTIORARI

The United Farm Workers of America, AFL-CIO, petions this Court to issue a writ of certiorari to the California Court of Appeal For the Fourth Appellate District, Division One, to review the judgment in *Maggio, Inc. v. United Farm Workers of America, AFL-CIO*, 227 Cal. App. 3d 847 (1991).

OPINIONS BELOW

The unpublished decisions of the California Superior Court for Imperial County are reprinted in the separately bound appendix to this *certiorari* petition (hereafter App., *infra*) at pp. 1a-4a, 5a-10a, and 56a-61a. The decisions of the California Court of Appeal for the Fourth

Appellate District are reported at 227 Cal. App. 3d 847 and 170 Cal. App. 3d 97, and are reprinted at App., *infra*, 11a-54a and 62a-73a. The unpublished order of the California Supreme Court is repirnted at App., *infra*, 55a.

JURISDICTION

The order of the California Supreme Court denying review of the court of appeal's decision was issued on May 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

The Fourteenth Amendment to the United States Constitution provides:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. *Background*

In 1975, the California legislature enacted the Agricultural Labor Relations Act, Cal. Labor Code § 1140 *et seq.* That Act, in protecting the right of agricultural employees to organize and engage in collective bargaining, follows the basic outline of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*[1]

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[1] *See Triple E, Produce Corp. v. Agricultural Labor Relations Board*, 35 Cal.3d 42, 48 (1983); *Highland Ranch v. Agricultural Labor Relations Board*, 29 Cal.3d 848, 855-56 (1981).

In the years immediately following, Cesar Chavez and the United Farm Workers of America, AFL-CIO (the "UFW" or the "Union") undertook the organization of, and the Union was certified as the exclusive bargaining representative for, the employees of some 30 vegetable growers in Southern California's Salinas and Imperial Valleys. The Union entered into an initial set of collective bargaining agreements with the growers, and those agreements expired in December 1978 and January 1979. (RT: XLI, pp. 10,229-30; LXVI, 21).[2]

In late 1978, the UFW undertook negotiations for new contracts with the growers without success. In January 1979 the Union's membership authorized strikes against a number of growers, including Maggio, Inc., one of the largest growers in the Imperial Valley. The strikes were timed to coincide with the winter and spring harvests of broccoli, lettuce and carrot crops, and thereby to put economic pressure on the growers in connection with the Union's efforts at the bargaining table. App., *infra*, 12a.

The UFW maintained pickets against Imperial Valley growers from January through June 1979. In response, a number of growers, including Maggio, formed a "Mutual Harvest Effort," in which they jointly agreed to harvest fields with replacement workers, to coordinate security, to conduct a public relations campaign against the Union and the strikers, and to share the costs and proceeds of that effort. App., *infra*, 12a.

The strike was characterized by strong feelings on both sides. Just as the Union sought to maintain solidarity during the strike, the growers aggressively recruited strike replacements from all segments of the community. Both strikers and grower personnel "were involved in some violence and public disorder." For the

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[2] "RT" citations are to the volumes and relevant page numbers of the reporter's transcript of the record on appeal in the state court of appeals. "CT" citations are to the clerk's transcript of relevant docket entries.

most part, these incidents occurred between January 29 and February 21. App., *infra*, 13a-14a.[3]

During the strike the growers were able to recruit some replacements and to harvest some of their crops. The growers were not able to perform all of the necessary cultivation practices at the proper times, however, and were not able fully to harvest all of the fields. App., *infra*, 14a.

2. *The State Court Decisions On Liability And Damages*

a. On January 28, 1980, Maggio and other growers filed this action in the superior court for Imperial County, seeking damages from the UFW and numerous individuals for alleged violence and unlawful picketing during the strike.[4] The parties initially intended to try

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[3] As discussed below, the trial court did not make any findings concerning specific acts or striker misconduct, other than to note that violence and misconduct occurred.

The state court of appeal, however, noted that during the course of a six-month strike there were five "major" confrontations between strikers and growers in January and February, with the last major incident occurring on February 21. App., *infra*, 14a n.4. The record reflects that on those occasions there were incidents of mass picketing, rock throwing, use of "nail-type" devices to cause flat tires to grower vehicles, and damages both to growers' and strikers' vehicles. App., *infra*, 14a n.4. Some pickets carried clubs and sticks.

The growers in turn were armed with guns. At one point during the stike, the Imperial County sheriff obtained a temporary restraining order to prevent grower personnel and security guards from carrying firearms, but there were weapons violations by growers even after the order was obtained. (RT: XII, pp. 2596-97, 2629; XIX, p. 4414). On February 10, a striker was shot and killed in a confrontation with grower personnel at a lettuce field owned by Sun Harvest, one of the struck employers. App., *infra*, 14a n.4.

[4] Following the filing of the Complaint in January 1980, the case languished. The Union was not served until December 20, 1980, and no significant activity occurred in the case for more than two years thereafter. In March 1983, the UFW filed a motion to dismiss the lawsuit under California Code of Civil Procedure § 583, which at that time provided that the court, "in its discretion, may dismiss

the case to a jury. Following several weeks of *voire dire*, however, the parties waived their right to a jury trial and stipulated to a bench trial before Judge William Lehnhardt. App., *infra*, 64a.[5]

Following an interlocutory appeal that is discussed at pp. 8-11 *infra*, the parties agreed to bifurcate the liability and damages portions of the trial. (RT: XL, pp. 10,131-32). On July 25, 1986, the trial court issued a decision on liability concluding that the Union was liable to Maggio for unspecified acts of violence and "unlawful picketing" from January 29, 1979 through June 30, 1979. App., *infra*, 1a-4a.

In reaching that conclusion, the trial court made no findings concerning any particular acts of misconduct, nor did that court make any findings as to how any particular act contributed to any of Maggio's losses. Instead, the trial court simply stated that "[d]efendant created a climate of violence which prevented plaintiff from recruiting sufficient workers to harvest its crops," and that "[d]efendant's violent conduct toward such harvesting activity as plaintiff was able to mount rendered that harvesting activity inefficient in certain cases and impossible in others." App., *infra*, 3a.

The trial court found that, although it "was not the sole cause of plaintiff's failure to cultivate and harvest

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an action for want of prosecution . . . if it is not brought to trial within two years after it is filed." On May 9, 1983, the growers filed a first amended complaint, and on May 27, 1983, the superior court denied the Union's motion to dismiss for failure to prosecute. App., *infra*, 50a-54a. Trial did not begin until March 5, 1985.

By the time of the trial court's decision on the merits in this case, all plaintiffs but Maggio had dismissed their claims, and the individual defendants were dropped from the case.

[5] The parties had great difficulty finding jurors who would be able to render an impartial verdict concerning the strike. As the state court of appeal noted, "Imperial County is a small, closely knit community economically dependent on agriculture. It may be virtually impossible to find county residents who were not personally affected to a greater or lesser extent by the strike." App., *infra*, 71a n.5.

its crops . . . , defendant's unlawful conduct was a substantial cause of plaintiff's loss." App., *infra*, 3a. That court concluded that, with the exception of two fields plaintiff was unable to harvest at the very start of the strike, "*all* of the crop loss claimed by the plaintiff was substantially caused by the defendant." App., *infra*, 4a. (emphasis added).

b. On April 16, 1987, the trial court entered judgment against the Union in the total amount of $1.68 million, App., *infra*, 5a-10a. In so doing, that court explained its approach to the award of damages as follows:

> As set forth fully in the court's [earlier] Statement of Decision Re Liability, the court found that plaintiff . . . met its burden in establishing that the tortious conduct of defendant proximately caused plaintiff's damage. Once plaintiff met its burden of proof that the unlawful strike activity was a substantial cause of plaintiff's damage, *the burden then shifted to defendant to show the extent of its contribution to plaintiff's damages, i.e., distinguish the damages caused* [*by*] *lawful conduct from the damages caused by unlawful conduct. Defendant did not meet this burden.* [App., *infra*, 5a-6a (emphasis added).]

Having thus shifted the burden to the Union to prove that Maggio's losses were *not* the result of tortious misconduct, the trial court again declined to make any findings concerning the manner in which specific acts of misconduct may have contributed to the employer's losses. That court simply concluded that Maggio lost $907,053 due to its inability to harvest its lettuce crop, $493,973 in unharvested broccoli; and $161,468 in carrots. The record reflects that included in these amounts are damages for Maggio's inability to harvest crops as late as May and June, at least three months after the last significant incident of picket line misconduct. (RT: XLi, pp. 10,134-40). In addition, the trial court awarded

$100,135 for Maggio's costs of providing security during the strike; $13,675 for the cost of housing replacement workers; and $3,149 for damages to vehicles and irrigation equipment. App., *infra*, 7a-9a.

c. The state court of appeal affirmed in all material respects. That court rejected the Union's claim that, by placing the burden of proof on the Union and failing to make specific findings that the employer's losses were in fact the direct result of tortious conduct, the trial court had violated the principles set forth in this Court's decisions in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[6]

The court of appeal, relying on common law tort principles, reasoned that "[w]here it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of his contribution, and . . . if he cannot sustain it he should be liable for the entire loss." App., *infra*, 26a (citation omitted). That court stated that in its view this Court's decisions in *Gibbs* and other cases have "required the union to bear the burden of segregating damages once the plaintiff has shown the union's tortious conduct was a substantial cause of its losses." App., *infra*, 29a-30a n.16. And the court of appeal upheld the lower court's conclusion that the Union had failed to meet its burden here. App., *infra*, 24a-29a.[7]

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[6] In its briefs to the court of appeal, the union cited *Gibbs* and *Claiborne Hardware*, and argued that the trial court's damage award had impermissibly trenched on its constitutional rights to engage in free speech and lawful associational activities in connection with the Imperial Valley labor dispute. *See* Appellant's Opening Brief at 1-2, 39, 53-57, 64-66; Appellant's Reply Brief at 3-8. In addition, the Union cited this Court's decision in *Speiser v. Randall*, 357 U.S. 513 (1958) as specific authority for the proposition that shifting the burden of proof to the union violated constitutional principles under the First Amendment and Due Process Clause. *Id.* at 6-7.

[7] In addition, the court of appeal upheld the trial court's rulings on a range of other issues. The court of appeal, for example, ruled

d. The California Supreme Court denied the Union's petition to review the court of appeal's decision on May 16, 1991. Two justices, Mosk and Broussard, expressed the opinion that the petition should have been granted. App., *infra*, 55a.

3. *The Proceedings On The Motion To Disqualify The Trial Judge*

a. On May 24, 1985, after nearly two months of testimony, Judge Lehnhardt informed the UFW's trial counsel in an off-the-record discussion that his wife had worked for Maggio as a striker replacement in Maggio's carrot harvest during the 1979 strike. The Union moved to disqualify Judge Lehnhardt under California Code of Civil Procedure § 170.1. App., *infra*, 64a.[8] Judge Lehnhardt

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that the trial court had properly admitted testimony from labor contractors containing hearsay statements from potential replacement workers that they would not work for Maggio due to fear of strike violence. App., *infra*, 23a-24a. In addition, the court of appeal upheld the method by which the trial court calculated prices, estimated yields per acre, and the like in arriving at a figure for Maggio's crop losses. The court of appeal found that the lower court had properly applied the "collateral source rule" in declining to offset against the damage award some $565,000 that Maggio had received as compensation for lost crops from an employer group known as the Fair Negotiating Committee. Similarly, the court of appeal found that the Union was not entitled to offset against damages an amount Maggio received from the Mutual Harvest Effort as proceeds from Maggio lettuce fields harvested by that group. App., *infra*, 30a-50a.

[8] Section 170.1 provides in relevant part that "[a] judge shall be disqualified if . . . [f]or any reason . . . a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." App., *infra*, 62a.

In response to the Union's disqualification motion, Judge Lehnhardt filed a declaration in which he stated that he had forgotten about his wife's involvement as a replacement worker until testimony in the case touched specifically on the alleged effects of violence and threats on the carrot harvest and work by replacement workers in the carrot shed. App., *infra*, 65a. But the judge did not volunteer the information even then; rather, he disclosed his wife's

refused to disqualify himself, however, and the disqualification matter was referred to another superior court judge. On June 4, 1985, that judge denied the Union's motion. App., *infra*, 56a-61a.

b. The Union immediately filed a petition for a writ of mandate to disqualify Judge Lehnhardt in the state court of appeal. In an opinion issued on July 16, 1985, the court of appeal noted that in its view the petition presents "a very close issue," one that "touches upon the core of the judicial process—the appearance of objectivity of the decision maker." App., *infra*, 70a, 63a. The court of appeal nonetheless denied the petition for a writ of mandate. That court found that there was no "continuing relationship between Maggio and Mrs. Lehnhardt giving rise to any current personal or financial interest which would disqualify Judge Lehnhardt." And the court of appeal rejected the suggestion "that Mrs. Lehnhardt's willingness to work for two days during the strike would cause a reasonable person to infer that Judge Lehnhardt would either favor Maggio or be biased against the union." App., *infra*, 70a-71a.[9]

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involvement only in response to a direct question from one of the Union's attorneys. *See* July 25, 1985 Petition For Review filed in the California Supreme Court in *United Farm Workers of America, AFL-CIO v. Superior Court*, 4 Civil. No. D003238, pp. 8-9.

[9] The court of appeal cited and discussed several federal cases that themselves found proposition that, as a matter of federal constitutional law, disqualification would be required if " 'a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality.' " App., *infra*, 68a (*quoting United States v. Ferguson*, 550 F. Supp. 1256, 1260 (S.D.N.Y. 1982) (Weinfeld, J.)). *See also Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

In *Ferguson*, Judge Weinfeld reasoned that due process requires that "not only must there be the reality of a fair trial and impartiality . . ., but also the appearance of a fair trial and impartiality." 550 F. Supp. at 1260. In support of that proposition Judge Weinfeld cited this Court's decisions in *Marshall v. Jerico*, 446 U.S. 238, 242 (1980); *In re Murchison*, 349 U.S. 133 (1955); *Offut v.*

c. The Union filed a petition to review the denial of the writ of mandate in the California Supreme Court. Citing the federal cases that the court of appeal had discussed in its decision, the Union argued that the trial judge should be disqualified because

> the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system. Any question of a judge's impartiality threatens the purity of the judicial process and its institutions. [July 25, 1985 Petition For Review at pp. 21-22 (*quoting Potashnick v. Port City Construction Co.*, 609 F.2d at 1111)].

And as noted above (n. 9 *supra*), the cases cited by the UFW cite in turn to pronouncements of this Court that the Due Process Clause itself requires "both the appearance and reality of fairness" and of an "impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerico*, 446 U.S. 238, 242 (1980).

The California Supreme Court denied the Union's petition for review on October 3, 1985. App., *infra*, 73a.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

The Union in this case was engaged in a lawful strike under state law, and had the right under the First Amendment to engage in peaceful picketing to implore workers and others in the community to exercise their

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United States, 348 U.S. 11, 14 (1954); and *Taylor v. Hayes*, 418 U.S. 488 (1974). Those cases have sought to define the requirements for a fair tribunal under the Due Process Clause, and they hold that due process will require disqualification in situations "which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true" between an accuser and an accused." *In Re Murchison*, 349 U.S. at 136 (*quoting Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

state law rights and honor the strike.[10] At the same time, although the parties vigorously disputed the evidence concerning the cause, extent and significance of strike violence as well as its relationship to the employers' claimed losses, there is no dispute that "some violence and public disorder" did occur. App., *infra*, 13a-14a.

The trial court did not, however, follow an approach calculated to limit its award of damages only to the direct consequences of violence. To the contrary, the trial court, with the approval of the state court of appeal, stated in a conclusory fashion that the incidents of violence were *a* "substantial cause" of the plaintiff-employer's losses, and then, without more, placed the burden on the *defendant-union* to separate those losses so caused from the consequences of lawful picketing and persuasion. Finding that the Union had not met that burden, the trial court imposed a ruinous judgment on the Union covering virtually all of the employer's claimed economic losses.

The sum and substance of the state court's approach to allocating losses here was to allow the plaintiff to collect damages for the consequences of *constitutionally protected activity* unless the *defendant* can prove by a preponderance of the evidence that some separable portion of the plaintiff's claimed losses was *not* due to tortious activity. These courts, in other words, proceeded as if it were proper to treat this case like a run of the mine tort case governed by normal tort causation and damages allocation rules.

By proceeding in that way, the state courts failed to heed the standards this Court has put in place to protect First Amendment rights where the course of conduct in question involves both constitutionally protected and unprotected activity. "[R]ecogniz[ing] the importance of avoiding the imposition of punishment for constitutionally

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[10] *See Senn v. Title Layers Union*, 301 U.S. 468, 478 (1937); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

protected activity," (*NAACP v. Claiborne Hardware*, 458 U.S. 886, 932 (1982)), the Court has made it plain that ordinary tort adjudication principles do *not* apply in a case such as this one. Rather, the plaintiff must at a minimum meet the heightened burden—which is a heavy one—of "demonstrating that fear rather than protected conduct was the *dominant force*" in the defendant's course of conduct as a whole (*id.*, emphasis supplied).

The state courts, moreover, compounded their error by shifting the burden of avoiding damages to the Union merely upon a conclusory finding that tortious conduct was *one* "substantial cause" of the employer's injury. In this regard, the decision below conflicts with the decisions of at least two other state courts concerning the adjudication of damages actions where the economic losses were caused in part by lawful, protected activity as well as with similar decisions of two federal courts of appeals.

The overall result of this entirely unsound approach is to make it an easy matter for plaintiffs to collect damages for losses cause by constitutionally protected activity. The particular result in this case is to grant an agricultural employer enormous damages that all but decimate the treasury of the union seeking to represent the agricultural laborers who have historically been among the most exploited workers in this society. Both of these results urgently call for this Court's review of the judgment and decision below.

B. Particularly given the paucity of detailed factual findings in this case to support the trial court's imposition of a burden of proof on the Union, the separate due process question presented by the trial judge's failure to disqualify himself provides an additional compelling reason for granting the petition. Not only actual bias but also the appearance of bias or an undue risk of bias in the finder of fact is constitutionally unacceptable. As discussed below, we submit that allowing a judge whose spouse has worked as a strike replacement during a

labor dispute to adjudicate her employer's claim for damages against a union charged with threats and violence against the replacements in that very dispute cannot be squared with the requirements of due process. It is beyond human nature to ask a judge to render scrupulously unbiased justice in these circumstances or to ask the defendant to accept the judge's ruling as unbiased justice.

I. THE DECISION BELOW CONFLICTS WITH THE GOVERNING DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER STATE AND FEDERAL COURTS

A. In this case, the Union was attempting, through its strike and attendant picketing against the employer, to secure a collective bargaining agreement. This goal was entirely proper as a matter of California law. Thus, as in *Claiborne Hardware, supra,*

> The charge of illegality—like the claim of constitutional protection—derives from the *means* employed by the participants to achieve those goals. The use of speeches, marches and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection. [458 U.S. at 933, emphasis supplied.]

Under these circumstances, in order to protect "the important First Amendment interests at issue" (*id.* at 918), rote application of ordinary state tort adjudication principles is not necessarily sufficient. Rather, because the state "may not award compensation for the consequences of nonviolent, protected activity" (*id.*), the need to accomodate state law with federal constitutional principles arises whenever a state seeks to impose liability for tortious conduct that occurs in the context of constitutionally protected activity, and to make that accommodation, "precision of regulation" is essential. *Id.* at 916, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1968).

Thus, although courts have the unquestioned power to provide a remedy for violence and threats of violence, " 'the permissible scope of state remedies in this area is

strictly confined to the direct consequences of such conduct and does not include consequences resulting from associated peaceful picketing' " or other expressive conduct protected by the First Amendment. *Claiborne Hardware*, 458 U.S. at 918 (*quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966)) (emphasis added).[11]

In *Claiborne Hardware*, the Court concluded that "the careful limitation on damages liability imposed in *Gibbs*" as a matter of federal labor law is equally applicable to First Amendment conduct as a matter of constitutional law. The Court reversed a state court judgment against the NAACP for the entire amount of losses during a seven-year consumer boycott in Mississippi, because an independent review of the record showed that incidents of violence and illegal conduct on which the state court had based its decision had in fact been only one cause of the plaintiffs' extensive economic losses due to the boycott,

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[11] In *United Mine Workers v. Gibbs*, 383 U.S. 715, a case decided under federal labor law, the Court considered a state law claim for damages against a union that had engaged in lawful primary picketing over a protracted period, during which time violence occurred at the beginning of the picketing but not thereafter. The Court reversed a lower court judgment awarding damages on the ground that the lower court had *not* "adequately defined the compass within which damages could be awarded under state law," and had awarded damages for the consequences of protected picketing activity. 383 U.S. at 732. In so doing, the Court concluded that state power may not be "exerted to compensate for anything more than the direct consequences of . . . violent conduct." *Id.* at 730 (*quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 249 n.6 (1958)).

The Court in *Gibbs* found support for its position in the Court's earlier decisions in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954) and *International Union, United Auto Workers v. Russell*, 356 U.S. 634 (1958). As the Court in *Gibbs* noted, 383 U.S. at 730, the damages awarded on a state law claim for violence in *Laburnum* were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants." Similarly, in *Russell*, the Court "specifically observed that the jury had been charged that to award damages it must find a proximate relation between the violence and threats of force and violence complained of, on the one hand, and the loss of wages allegedly suffered, on the other." *Gibbs*, 383 U.S. at 730.

and that the consequences therefrom were separable from the consequences of the lawful boycott activity.[12] The Court held that where both constitutionally protected and unlawful means are used toward an otherwise lawful goal, the plaintiff can recover for economic losses only insofar as it can bear "the burden of demonstrating that fear rather than protected conduct was the *dominant force*" in causing the loss. 458 U.S. at 933 (emphasis added). As the Court further explained:

> In litigation of this kind the stakes are high. Concerted action is a powerful weapon . . . The burden of demonstrating that [violence] colored the entire collective effort . . . is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott . . . Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. [458 U.S. at 933-34].

Gibbs and *Claiborne Hardware* entail the conclusion that, where a plaintiff seeks damages for torts committed during the exercise of lawful expressive conduct, the plaintiff cannot meet its burden to demonstrate that the damages it seeks are in fact the direct consequences of the tort simply by meeting ordinary tort causation standards and then having the evidentiary burden shifted to plaintiffs. Rather, those cases require that plaintiffs meet a heightened burden and, to assure that the burden has

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[12] As the Court in *Claiborne Hardware* noted, the state law rules applied to adjudictae civil lawsuits between private parties constitute "state action" for purposes of the First and Fourteenth amednments. 458 U.S. at 961 n.51 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

been met, require that the state courts in cases of this kind support their decisions with evidentiary findings sufficient to identify the precise impact of unlawful violence and to make clear that state power is not being applied to compensate "for the consequences of nonviolent, protected activity." *Claiborne Hardware*, 458 U.S. at 918.

Nonetheless the state courts proceeded to adjudicate this case as if *Claiborne Hardware* and *Gibbs* had never been decided and as if this were a run of the mine tort case in which damages could be assessed on normal tort damages rules. That, we submit, was an error that this Court must correct.

In proceeding in this way the court of appeals purported to rely on the *Gibbs* Court's discussion of *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), in which this Court found that "special facts" of pervasive violence might support the conclusion that damages due to lawful conduct are not "separable" and that *all* damages resulting from a strike or picketing must be awarded. *Gibbs*, 383 U.S. at 731-32.[13] But the lower court's reliance on that so-called *Meadowmoor* exception was entirely misplaced.

First, in *Meadowmoor itself*, the Court cautioned that the extraordinary remedy imposed there could never be justified

> by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force. [312 U.S. at 293.]

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[13] In *Meadowmoor*, the Court held that specific and substantial findings of pervasive violence justified an injunction against both violent and nonviolent activity.

Second, this Court has distinguished the facts of *Meadowmoor* in every similar case that has been decided since, including in *Gibbs* and *Claiborne Hardware*.[14] And the Court has required, as a matter of constitutional principle, the most painstaking factual showing, accompanied by specific judicial findings, before a conclusion of "inseparability" under *Meadowmoor* can be made. *See Claiborne Hardware*, 458 U.S. at 932-33.

The decision of the lower court does not even begin to approach the evidentiary requirements imposed in this Court's decisions. The lower court's factual findings are worse than insubstantial; they are nonexistent.[15]

B. The courts below, then, failed to make even conclusory findings sufficient to show that plaintiff met its heightened burden of proof, much less the detailed evidentiary findings necessary for reviewing courts to determine on their own whether that burden has been sustained. In this regard the state decision here conflicts with the decisions of other state and federal courts.

For example, in *United Aircraft Corp. v. Intl. Assn. of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976), the Connecticut Supreme Court

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[14] *See AFL v. Swing*, 312 U.S. 321, 325 (1941); *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 296 (1943); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 341 (1958); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 180-81 (1968).

[15] As the Court has made clear on a number of occasions, where, as here, the issue is whether the state has intruded into areas of expression guaranteed by the First Amendment, the Court will make an independent examination of the record to assure that " 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Claiborne Hardware*, 458 U.S. at 915 n.50 (citations omitted); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Meadowmoor*, 312 U.S. at 293. Thus, the serious constitutional issues raised in this case may not be minimized by characterizing them merely as the application of settled principles to particular facts.

took a markedly different view from the court below of the evidentiary burdens required to support a state law damage award in a case involving both illegal and affirmatively protected activity. In particular, the Connecticut court expressly rejected the position of the state court here that once ordinary causation standards were met, "the burden was on defendants to establish the allocation of losses between peaceful strike activity and unlawful strike activity." 285 A.2d at 342. The Connecticut court held instead that "[i]t was the plaintiff's burden to prove the damages which it claimed had resulted from the tortious acts complained of." *Id.*[16]

Similarly, *Stryjewski v. Local 830, Brewery Drivers*, 451 Pa. 550, 304 A.2d 463 (1973), makes plain that the Pennsylvania courts would reject the trial court's findings and its allocations of burdens here as a basis for awarding damages. In reversing a lower court damage award, the *Stryjewkski* court rejected as insufficient to sustain the verdict the conclusory statement in "the Chancellor's adjudication stat[ing] that '[a]ll damage suffered by Plaintiffs from the union's activity was substantially caused by the union's violent and mass activities and picketing . . .,'" 304 A.2d at 466. The *Stryjewski* court explained:

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[16] The court in *United Aircraft* rejected the employer's claim that damages from lawful and unlawful conduct were not separable and therefore should have been awarded against the Union in their entirety. That court ordered the trial court to calculate, as a percentage of the employer's total strike losses, the monetary value of the losses "due to the involuntary absence of employees because of fear and coercion as a result of . . . illegal, tortious activities." 363 A.2d at 1071.

In response, the lower court took live testimony from 135 employees and reviewed written testimony from 73 others concerning their reasons for being absent from work during the strike. On the basis of the evidence the court concluded that tortious acts caused 23.6 percent of the employer's losses at one plant and 19.3 percent of the losses at another plant. These findings were set forth in a decision containing "401 number paragraphs covering 109 printed pages of record." 363 A.2d at 1071.

> Our task is *not* merely to ensure that the damages sustained were proximately caused by the challenged picketing and other activity, but rather is to ensure that such damages, to be constitutionally compensable, resulted *solely* from unlawful and violent activities, which are without the protection of the first amendment. [*Id.*, emphasis supplied.]

Because "no computations exist within the adjudication which indicate how the damages were apportioned between the constitutionally protected and unlawful picketing activities; nor does the opinion indicate the specific injuries to the plaintiff which support the . . . damage assessment" (*id.*), the Pennsylvania Supreme Court could not simply review the findings below applying the proper constitutional standard, but instead remanded for constitutionally appropriate findings and conclusions.

The decision below is also at odds with the law as announced and applied in the Ninth and Eleventh circuits. In *Rainbow Tours v. Hawaii Joint Council*, 704 F.2d 1443 (9th Cir. 1983), the Ninth Circuit considered a case in which there was evidence of unlawful mass picketing on two days, January 29 and 30, and lawful picketing thereafter. The trial court had awarded damages for an employer's loss of business through February 7. The Ninth Circuit reversed, and held that in no event could damages be awarded for days after January 30. Moreover, the Ninth Circuit left it to the trial judge on remand to determine the reasons why employees did not go to work on January 29 and 30. The court of appeals made clear that, if the trial court determined that employees stayed away out of "union principle," and not in response to the unlawful picketing, no damages could be awarded even for the days on which unlawful picketing occurred. 704 F.2d at 1447-48.

Finally, in *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985), the court, following the approach of the Ninth Circuit in *Rainbow Tours*, held that damages for lost business could not be awarded even for days

on which unlawful picketing occurred unless the employer could demonstrate that employees stayed away out of fear, and not for reasons of union solidarity. 763 F.2d at 1250. It is clear from these decisions that these courts, contrary to the court below, would not permit an award of damages except to the extent that the *plaintiffs* met the burden of demonstrating which damages were *in fact* the direct result of unlawful conduct, and not the consequence of lawful, protected union activity.

C. The decision below, in addition to being inconsistent with this Court's central holdings in *Gibbs* and *Claiborne Hardware* and in conflict with the decisions of the lower courts in directly analogous circumstances, is at odds with the principles more generally applicable in adjudicating cases involving First Amendment protected activity.

For example, *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (emphasis supplied), teaches that where the issue "is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated' . . . *where the burden of proof lies may be decisive of the outcome.*" *See also Armstrong v. Manzo*, 380 U.S. 545, 551 (1965). *Speiser* itself involved a state rule denying tax exemptions to persons advocating the violent overthrow of the government, and the Court assumed without deciding that states could deny exemptions to persons who engaged in speech for which they constitutionally could be fined or imprisoned. The Court held, however, that the state could not place on the taxpayer the burden of proving that he had *not* engaged in the prohibited activity, for to do so would unduly chill the exercise of important First Amendment freedoms. 357 U.S. at 526.

Similarly, in other areas of constitutional law this Court has formulated analogous tests of causation that seek to distinguish between results caused by the exercise of constitutional rights and results caused by other, unprotected conduct. In *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), for example, the Court re-

quired that a public employer bear the burden of showing that a decision to discharge an employee would have occurred even in the absence of the employee's First Amendment conduct.

The employer in this case should bear no less a burden of demonstrating, in effect, that the damages it claims are solely the result of unprotected conduct, and bear no causal relationship to protected picketing.

II. THE TRIAL JUDGE'S FAILURE TO DISQUALIFY HIMSELF RAISES AN ADDITIONAL ISSUE WARRANTING THIS COURT'S REVIEW

The Court's cases under the Due Process Clause have recognized that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This due process requirement seeks to protect "both the appearance and reality of fairness." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

To be sure, not every issue relating to judicial disqualification rises to a constitutional question under the due process clause. *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813, 820 (1986). Nonetheless, "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). In such cases, disqualification is constitutionally required.

Up to this point, these cases have included those in which the adjudicator is disqualified due to a direct pecuniary interest in the outcome of the proceeding,[17] or in which a judge who has been the target of personal abuse or criticism is disqualified from presiding over contempt proceedings.[18] The Court has not yet had occasion to con-

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[17] *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

[18] *Taylor v. Hayes*, 418 U.S. 488, 501-03 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

sider a due process claim for disqualification in the specific situation presented here, in which the judge's spouse was directly included in the underlying events of the case and, indeed, was a potential witness. In such a situation, no less than in this Court's prior cases, there is at least a "temptation to the average man as a judge . . . not to hold the balance nice, clear and true" between the parties. *In re Murchison*, 349 U.S. at 136.

We submit that this issue in this context is an important one that warrants the Court's review. As we have shown, the adjudication of the claims involved in cases such as this requires particularly difficult and sensitive judgments by the trier of fact. A judge in such a case is asked to make difficult legal judgments, as well as to weigh the credibility of strikers and strike replacements alike concerning the nature and effect of alleged strike misconduct. A judge who is married to and lives with a replacement will have experienced the strike in a much more personal light than otherwise, and it is difficult to imagine that the judge will not be inclined to tilt his sentiments toward the employer and replacements and away from the union and the strikers.

Both sides in these cases, as well as the public itself, deserve scrupulous fairness in the adjudication of the emotional issues arising out of labor disputes. The risk of bias in allowing a judge to adjudicate issues in a labor dispute in which his spouse worked as a strike replacement is a risk, we submit, that the due process clause forbids.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(2)

91-154

No. ——

Supreme Court, U.S.
FILED
JUL 26 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

MAGGIO, INC.,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF IMPERIAL

Case No. 51761

MAGGIO, INC., an Arizona corporation,
Plaintiff,

vs.

UNITED FARM WORKERS OF AMERICA, AFL-CIO, an unincorporated association,
Defendant.

STATEMENT OF DECISION RE LIABILITY

Pursuant to Code of Civil Procedure Section 632 and Rule 232(c) of the California Rules of Court, the Court issues the following Statement of Decision Re Liability explaining the factual and legal basis for its decision on the trial of the bifurcated issue. Defendant, through the conduct of its officers, officials conducting the Imperial Valley strike, struck company coordinators and picket captains, authorized, participated in and ratified unlawful picketing and intentional violence from and after January 29, 1979 to June 30, 1979. Such conduct was a substantial cause of plaintiff's loss materially contributing to plaintiff's damage. Said conduct caused plaintiff's crop loss for all fields claimed except for the broccoli in Ranch 15C and the lettuce in Ranch 4A. Further, defendant's conduct caused plaintiff's loss with respect to security expenses, housing costs, and damage to vehicles, equipment, irrigation gates and ditches.

The Court's decision is based upon consideration of all of the evidence submitted by the Court, briefs filed by

the parties herein, and the oral argument of counsel, leading to the following findings and conclusions:

I

INTENTIONAL CONDUCT

1. The court finds by clear, unequivocal and convincing proof that defendant union authorized, participated in and ratified regular, consistent and repeated acts of unlawful picketing from and after January 29, 1979 through June 30, 1979.

2. This regular, consistent and repeated unlawful conduct was intentionally committed by union strikers under the leadership of the union consisting of union officers, union officials conducting the Imperial Valley strike, company coordinators and picket captains.

3. The defendant union conducted its strike activity directly under the authority of its president and executive board. It does not operate through the use of local branches. The union through its officers, officials conducting the strike, company coordinators and picket captains had knowledge of this unlawful activity and in possession of this knowledge continued to conduct unlawful strike activity.

4. The evidence at the trial that the union's strike activity was unlawful and violent was not effectively controverted by the union. The main thrust of the union's defense was that the union's violence was caused by its reaction to conduct by plaintiff, its agents and the Imperial County Sheriff's Office. The court specifically rejects the defense contention that the plaintiff and his agents caused the violence during the strike. The violence was caused by the defendant union when it attempted, first by nonviolence, to prevent the plaintiff from harvesting his crops. When the union was unsuccessful, it resorted to violence.

5. The court specifically rejects the defendant union's contention that the Imperial County Sheriff's Office caused the violence.

II

NEGLIGENT CONDUCT

6. The court finds that the defendant union negligently failed to supervise and control the strike and the union's strikers. The union's conduct of the strike was well planned and well organized. The union had knowledge of the violence its strikers were committing. The union did not take reasonable steps to control and regulate its strike activity.

7. The court finds that plaintiff's conduct during the strike was proper and reasonable in the face of the violent acts of defendant union, and that plaintiff's conduct was not a contributing cause of plaintiff's loss.

III

PROXIMATE CAUSE

8. The court finds that defendant union was not the sole cause of plaintiff's failure to cultivate and harvest its crops, but does find that defendant's unlawful conduct was a substantial cause of plaintiff's loss materially contributing to plaintiff's injury.

9. Defendant union was the cause of plaintiff's inability to harvest crops in the following ways:

a. Defendant created a climate of violence which prevented plaintiff from recruiting sufficient workers to harvest its crops.

b. Defendant's violent conduct toward such harvesting activity as plaintiff was able to mount rendered that harvesting activity inefficient in certain cases and impossible in others where plaintiff was unable to provide adequate security.

10. The court finds that all of the crop loss claimed by the plaintiff was substantially caused by the defendant except for the broccoli in Ranch 15C, approximately 35 acres, and the lettuce in Ranch 4A of approximately 41 acres.

11. The inability of plaintiffs to harvest these early fields was caused by plaintiffs not being ready at the onset of the strike and not by defendant's unlawful conduct.

12. The court finds that defendant union's unlawful conduct was also a substantial cause of plaintiff's loss with respect to certain security expenses and certain housing costs due to moves required by union violence.

13. Defendant union directly damaged vehicles, equipment and irrigation gates and ditches.

14. The Union carried on this strike in an unlawful manner. The Union did not act maliciously as defined by Civil Code Section 3294. The court does not award punitive damages.

DATED: July 25, 1986

/s/ William E. Lehnhardt
WILLIAM E. LEHNHARDT
Superior Court Judge

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF IMPERIAL

Case No. 51761

CARL JOSEPH MAGGIO,
Plaintiff,

vs.

UNITED FARM WORKERS OF AMERICA, AFL-CIO, an unincorporated association,
Defendant.

STATEMENT OF DECISION

The court issues the following Statement of Decision setting forth the factual and legal basis for its decision in the liability and damages phases of the trial of this case. The court hereby incorporates by reference and attaches hereto the Statement of Decision Re Liability prepared pursuant to Code of Civil Procedure § 632 and California Rules of Court § 232(c), filed on July 25, 1986.

I

PREAMBLE

As set forth fully in the court's Statement of Decision Re Liability, the court found that plaintiff proved by clear, unequivocal and convincing proof that defendant was responsible for tortious conduct. The court further found that plaintiff met its burden in establishing that the tortious conduct of defendant proximately caused plaintiff's damage. Once plaintiff met its burden of proof that the unlawful strike activity was a substantial cause of plaintiff's damage, the burden then shifted to defen-

dant to show the extent of its contribution to plaintiff's damages, i.e., distinguish the damages caused from lawful conduct from the damages caused by unlawful conduct. Defendant did not meet this burden.

The court's decision herein is based solely upon consideration of all of the evidence submitted to the court, briefs filed by the parties herein, and the oral argument of counsel, leading to the following findings and conclusions.

II

PLAINTIFF'S CROP DAMAGE CLAIM

Plaintiff is entitled to damage for net lost revenue shown to be caused by defendant's tortious conduct affecting plaintiff's ability to cultivate, harvest and market its crops. Plaintiff has shown such loss with reasonably reliable and certain evidence as follows:

1. Plaintiff is entitled to damages for crops it reasonably could have expected to harvest during the strike year by using strike year prices.

2. The lettuce market prices during the 1978-79 season were the highest they had been for many years, both before and after the strike commenced in mid-January, 1979. Members of the entire union and non-union lettuce industry received these high prices throughout the season, regardless of whether they were the targets of strike activity or not. The court heard testimony of lawful strike activity and while a lawful strike may have been one of many factors contributing to the elevated prices, it was not the sole factor since the prices were already at an elevated level for several weeks before the strike commenced. Defendant did not prove, nor did it attempt to prove, to what degree a lawful strike may have affected the market prices. Nor did defendant meet its burden in proving what, if any, portion of plaintiff's crop was lost due to the efforts of lawful strike activity. The facts

presented at trial established that, but for the defendant's tortious conduct directed at plaintiff, plaintiff would have harvested its lettuce crop and would have received the same market prices as the rest of the industry. Finally, defendant did not prove that plaintiff received higher market prices compared to the rest of the lettuce industry as a direct benefit of defendant's tortious conduct directed at plaintiff.

The prices on carrots and broccoli were not significantly elevated during the strike year.

3. The court finds that harvest costs and returns and allowances would necessarily have been increased by a lawful strike without violence.

4. As to all three crops, the tortious conduct of the Union made precise calculation of damages impossible. Maggio provided credible evidence, including reasonable averages and data from the Federal-State Market News Service and Circular 104 on Imperial Valley Crops to support the following damages which the court finds were caused by defendant's tortious activity:

(a) Broccoli

Total crop lost 130,620 cartons	$ 924,756
Net cooling revenue lost at .48 per carton	$ 62,697
	$ 987,453
Less harvest cost at 3.40 per carton	$ 444,108
	$ 543,345
Less 5% returns and allowances × $987,453	$ 49,372
	$ 493,973

(b) Carrots

154 acres × 16.8 tons per acre = 51744 CWT × 9.96 average price	$ 515,370
Cooling revenue lost at .63 CWT	$ 32,598
	$ 547,968

Less harvest cost of 6.94 CWT	$ 359,103
	$ 188,866
Less 5% returns and allowances × $547,968	$ 27,398
	$ 161,468

(c) Lettuce

159,477 cartons	$1,387,568
Plus net cooling at .23 per carton	$ 36,680
	$1,424,248
Less harvest cost of 2.35 per carton	$ 374,770
	$1,049,478
Less 10% returns and allowances × $1,424,248	$ 142,425
	$ 907,053

CROP DAMAGE SUMMARY

Broccoli	$ 493,973
Carrots	$ 161,468
Lettuce	$ 907,053
Total	$1,562,494

III

OTHER DAMAGES

1. Plaintiff is entitled to security damages, all of which were caused by defendant's tortious conduct, in the amount of $100,135. Said amount does not reflect security expenses prior to the inception of defendant's violent conduct, nor did Maggio claim damages for its normal security expenses.

2. Plaintiff is entitled to property damages caused by defendant in the amount of $3,149.

3. Plaintiff is entitled to housing costs incurred as a result of defendant's tortious conduct in the amount of

$13,675. The violence at the Saikhon labor camp at Dogwood and Worthington Roads prevented Maggio from lodging its replacement workers at that location. The cost of the alternative housing caused by the tortious conduct is awarded by the court.

IV

FINDINGS WITH RESPECT TO DEFENDANT'S CONTENTIONS

Alternative Damages Claim

1. The UFW's alternative damage claim is not reasonable. It is not supported by the evidence. It is based on an unpersuasive use of five year averages, consideration of excess profits, and mitigation offset and recoupment theories which are not supported by the evidence presented or the law and are therefore rejected by the court.

Benefit

2. The defendant fails to meet its burden to show that any direct benefit to plaintiff was caused by defendant's tortious conduct, which benefit defendant claims would mitigate its responsibility.

Collateral Source

3. Defendant is not entitled to mitigate by any offset the Fair Negotiating Committee receipts. Maggio received these funds from a source independent of the defendant. Maggio was subject to risk of loss, which was shifted to other parties in the group. The Fair Negotiating Committee distributed the risk among similarly situated persons. Further, as a matter of public policy, an intentional tortfeasor should not be able to offset collateral payments made to injured parties who entered into such an arrangement for whatever purpose.

LET JUDGMENT BE GRANTED TO PLAINTIFF AS FOLLOWS:

Broccoli	$ 493,973
Carrots	$ 161,468
Lettuce	$ 907,053
Security	$ 100,135
Property	$ 3,149
Housing	$ 13,675
Total	$1,679,453

together with plaintiff's costs of suit.

DATED: Mar. 27, 1987

/s/ William E. Lehnhardt
WILLIAM E. LEHNHARDT
Judge of the Superior Court

APPENDIX B

[No. D006453. Fourth Dist., Div. One. Feb. 15, 1991]

[As modified Feb. 19, 1991.]

MAGGIO, INC.,
Plaintiff and Respondent,

v.

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Defendant and Appellant.

Dianna Lyons and Barbara Macri-Ortiz for Defendant and Appellant.

Gray, Cary, Ames & Frye, Marcelle E. Mihaila, Jay W. Jeffcoat, Finkle, Davenport & Barsamian and Ronald H. Barsamian for Plaintiff and Respondent.

OPINION

KREMER, P. J.—The United Farm Workers of America (hereafter UFW or Union) appeals a judgment awarding damages to grower Maggio, Inc. for crop losses, damaged personal property, housing costs for replacement workers and additional security expenses caused by the tortious conduct of UFW strikers during a 1979 strike in the Imperial Valley.

On appeal, the UFW contends the evidence does not support a finding the Union authorized, participated in or ratified tortious activity of the strikers. The UFW contends the court erred in calculating damages, applying the collateral source rule, admitting hearsay statements by labor contractors, admitting a summary of Maggio's damage claims without expert testimony, and denying the UFW's motion to dismiss pursuant to Code of Civil Procedure section 583, subdivision (a) for Maggio's failure

to diligently prosecute the case. The UFW also seeks sanctions for Maggio's unsuccessful motion to dismiss the UFW's appeal. We affirm the judgment as modified.

BACKGROUND

In January 1979, the UFW sanctioned strikes against a number of vegetable growers in the Imperial Valley, including Maggio, after negotiations for a new contract failed. The strike against Maggio was sanctioned on January 25.

Eight struck growers [1] responded to the strike by forming a Mutual Harvest Effort [2] where they agreed to jointly harvest their lettuce fields, deduct costs and divide the proceeds equally. They recruited replacement workers, coordinated security and conducted a public relations campaign. Within the Mutual Harvest Effort, the growers had varying responsibilities. Maggio had responsibility for photographing and documenting strike activities and for analyzing which fields the Mutual Harvest Effort crew should harvest.

In 1979, the UFW's organization was run through its president, Cesar Chavez, and its executive board. The UFW delegated day-to-day responsibilities for the strike to executive board member Marshal Ganz. He reported directly to Cesar Chavez. Ganz was on the picket lines at least once a week and sometimes more through February 12 or 13 when his position as strike coordinator ended. The picket lines were also visited by other UFW leaders including Cesar Chavez, UFW Vice-President Frank Ortiz who replaced Ganz in handling the day-to-day strike responsibilities in mid-February, and strike officer administrator Jessica Govea. A UFW attorney also participated in noon meetings with the sheriff.

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[1] The eight growers were Maggio, California Coastal Farms, Colace, Growers Exchange, Luette, Saikon, Sun Harvest and Vessey.

[2] Some union supporters called the Mutual Harvest Effort "the circus."

The UFW bargaining units for the individual growers were called "ranch communities." The ranch communities elected members to a "ranch committee" which had authority to discipline someone who violated the union rules through a procedure requiring written notice of charges, a hearing, a vote by the ranch community membership on the appropriate punishment and giving a right of appeal to the UFW Executive Committee.

At the time of the strike, the ranch committees elected picket captains to maintain order on the picket lines and ensure the strikers followed the UFW strike rules. The ranch committee also appointed strike coordinators who had responsibility over the picket captains. At Maggio, the strike coordinator for the first part of the strike was Richard King and the picket captains included: Ramon Ruiz, Jorge Lopez, Roberto Beltran, Aurelio Guerrero, Rojelio Guerrero and Candelario Zamora.

The UFW's constitution pledged nonviolence. The Union's strike rules prohibited drinking, drugs and weapons on the picket line, and the Union had a policy against blocking public streets. Union officials, including Ganz, the ranch committee, and the strike coordinator had authority to remove people from the picket line for violating union rules.

The record shows both the strikers and grower personnel were involved in some violence and public disorder. Both sides agree there were a number of days when confrontations occurred where UFW pickets engaged in rock-throwing, blocking access to and from grower facilities or fields, rushing into fields towards replacement workers, throwing nail-type devices [3] on the ground to cause flat

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[3] Deputy Sheriff John Lemon described these nail devices as follows: "It's a barbed—it's a—take a large nail, or a couple of large nails and you bend them into a star shape. No matter how you throw them on the ground, there will always be one point up. It's mainly used for damaging tires."

tires in grower vehicles, overturning grower vehicles, carrying or using sticks, clubs, sling shots or other weapons.[4] The parties disagree as to whether there were "only . . . isolated incidents of picket line misconduct" (as the UFW contends) or "relentless violence" by the UFW strikers (as Maggio contends). The trial court concluded there were "regular, consistent and repeated acts of unlawful picketing" which "created a climate of violence."

As a result of the strike, Maggio was not able to perform the necessary cultural practices for the crops at the proper times and was not able to fully harvest all the fields. Maggio vehicles and equipment were damaged and Maggio incurred costs of hiring additional security guards and of housing replacement workers in a motel.

The trial court awarded damages to Maggio of $1,562,494 for losses in harvesting carrots, broccoli and lettuce, $100,135 for the hiring of additional security guards, $3,149 for property damage to vehicles, irrigation equipment and other items and $13,675 for providing alternate housing to the labor camp for replacement workers.

DISCUSSION

I

Liability Issues

The trial court found "by clear, unequivocal and convincing proof" that the union "authorized, participated in and ratified regular, consistent and repeated acts of un-

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[4] Not all these activities occurred on all of the days. The days on which "major incidents" occurred include January 29 (which Maggio labels as "Bloody Monday"); February 4 (confrontation at Maggio carrot field at Worthington and Highline roads); February 5-8 (night picketing at the Sanchez labor camp); February 10 when striker Rufino Contreras was shot and killed; (confrontation at Sun Harvest lettuce field near Verde School Road); February 21 (strikers enter field of nonstruck Abatti and confrontation occurs at Maggio lettuce field at Miller and Chell Roads).

lawful picketing from and after January 29, 1979 through June 30, 1979." The court also found the union had "negligently failed to supervise and control the strike and the union's strikers." The court concluded the union's conduct "was not the sole cause" of Maggio's crop losses but was a "substantial cause . . . materially contributing to [Maggio's] injury" because: (1) the union "created a climate of violence which prevented [Maggio] from recruiting sufficient workers to harvest its crops" and (2) the union's "violent conduct . . . rendered [the] harvesting activity [Maggio was able to mount] inefficient in certain cases and impossible in others . . . ."

A.

The UFW's Liability for the Tortious Acts of Strikers

A union has a right to engage in peaceful picketing. (*City and County of San Francisco* v. *United Assn. of Journeymen etc. of United States & Canada* (1986) 42 Cal.3d 810, 819 [230 Cal.Rptr. 856, 726 P.2d 538].) However, state courts may enjoin unions from mass picketing, violence, threats of violence and obstructions to ingress and egress which threaten public health and safety and may award damages to an employer for tortious acts committed by union members during the conduct of a strike. *Kaplan's Fruit & Produce Co.* v. *Superior Court* (1979) 26 Cal.3d 60, 69, fn. 5 [160 Cal.Rptr. 745, 603 P.2d 1341]; *City and County of San Francisco* v. *United Assn. of Journeymen etc. of United States & Canada*, *supra*, 42 Cal.3d 810, 819.) The United States Supreme Court in *Mine Workers* v. *Gibbs* (1966) 383 U.S. 715, 750 [16 L.Ed.2d 218, 230, 86 S.Ct. 1130] affirmed that state courts have the power to "grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order,' [citation]." [5]

[5] The UFW suggests a court can award damages against a union only for violent conduct or threats of violence. The UFW complains

A union may be held liable for the damages caused by the tortious conduct of its members when the union authorized, participated or ratified the tortious acts. (*Hiestand* v. *Amalgamated Meatcutters, Etc.* (1983) 233 Kan. 759 [666 P.2d 671, 673].) In California, general rules of agency apply to a union's liability for the tortious conduct of its members so that a union is liable for the acts of its officers, agents, or employees when they are acting within the scope of their employment. (*J.R. Norton Co.* v. *General Teamsters, Warehousemen & Helpers Union* (1989) 208 Cal.App. 3d 430, 443 [256 Cal.Rptr. 246], cert. den. — U.S. — [107 L.Ed.2d 193, 110 S.Ct. 242].) To impose liability on a union for tortious acts committed by its members, it is not necessary to show the top union officials approved of the violence or illegal conduct; liability may be imposed based on the acts of lesser officials, strike coordinators or picket captains. (*See Mine Workers* v. *Gibbs, supra*, 383 U.S. at p. 732 [16 L.Ed.2d at p. 231] ["the UMW representative"]; *Charles D. Bonanno Linen Service, Inc.* v. *McCarthy* (1st Cir. 1983) 708 F.2d 1, 11, cert. den. 464 U.S. 936 [78 L.Ed. 2d 312, 104 S.Ct. 346] ["union's representative"]; *Kayser-Roth Corp.* v. *Textile Workers Union of America* (6th Cir. 1973) 479 F.2d 524, 527, cert. den. 414 U.S. 976 [38 L.Ed.2d 219, 94 S.Ct. 292] [the "strike supervisors"]; see *Ritchie* v. *United Mine Workers* (6th Cir. 1969) 410 F. 2d 827 [examining circumstantial evidence of involvement by union members]; *Carter-Glogau Labs* v. *Const. Lab. Local 383* (1986) 153 Ariz. 351 [736 P.2d 1163, 1165, 1169] [union stewards, union business agent and picket captains].)

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the court here awarded damages based only on "unlawful" conduct. Not only does the context of this case suggest the court awarded damages based on violent conduct and threats of violence, but also the cases make it clear damages may be awarded against a union based on *tortious* conduct.

B

Sufficiency of the Evidence to Support the Court's Finding the Union Negligently Supervised the Strikers and Authorized, Participated in and Ratified the Illegal Conduct

The UFW attacks the court's determination that the union negligently failed to supervise the strikers and was involved in the illegal strike activity. The UFW argues it knew of the violence only after it was committed:

> "The record demonstrates that the Union *became aware after the fact* of various isolated incidents of violence which occurred sporadically during the strike. However, there is no substantial evidence to suggest that the Union leadership ever learned the identities of specific strikers who committed specific acts of violence, or that it took no responsive action." (Italics as added by the Union.)

In assessing whether substantial evidence supports the determinations of the trial court, we look at the evidence in the light most favorable to the judgment, accepting as true all the evidence most favorable to the respondent and discarding the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. (*Hinson* v. *Clairemont Community Hospital* (1990) 218 Cal.App. 3d 1110, 1125 [267 Cal. Rptr. 503].) We do not reweigh the evidence, reconsider the credibility of witnesses or reresolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence; those are the responsibilties of the trial court. (*Overton* v. *Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370 [210 P.2d 757], disapproved on other grounds in *Parsons* v. *Bristol Development Co.* (1965) 62 Cal.2d 861 [44 Cal.Rptr. 767, 402 P.2d 839].) Our function is only to determine whether *any* substantial evidence supports the findings of the fact finder. (*Leff* v. *Gunter* (1983) 33 Cal.3d 508, 518 [189 Cal.Rptr. 377, 658 P.2d 740].)

Here, contrary to the UFW's contention, there was substantial evidence to support the court's determination.[6] It is true there was evidence in the record showing the UFW's constitution and strike rules condemned violence, that Ganz and Chavez counseled the strikers against resorting to violence or disruptions of the public order and that the top leadership of the UFW, following some of the violence, took actions to reduce incidents of violence.[7] However, it is also true that there was substantial evidence showing UFW leadership, including Maggio's strike coordinator and picket captains, were actively involved in instigating violence and other illegal conduct and that the UFW leadership did not enforce its own strike rules and policies condemning violence and blocking access of vehicles and replacement workers.

There was evidence showing Maggio strike coordinator Richard King, Maggio picket captains and other UFW leadership were present at times when rock throwing, rushing fields and blocking access occurred and were aware that there was violence occurring on the picket lines. There was evidence that the picket captains urged strikers to throw rocks and to vandalize grower equipment. There was evidence that King and the picket captains made threats to kill the replacement workers.

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[6] The trial court here found "by clear, unequivocal and convincing proof" that the UFW "authorized, participated in and ratified regular, consistent and repeated acts of unlawful picketing from and after January 29, 1979 through June 30, 1979." Maggio contends the trial court erroneously applied a clear and convincing proof standard. The UFW contends such a standard was required and was not met. Recently, the court in *J.R. Norton Co.* v. *General Teamsters, Warehousemen & Helpers Union, supra*, 208 Cal.App.3d 430, 437-438, rejected the clear and convincing standard, holding the preponderance of evidence standard applies.

[7] For example, following the death of UFW striker Rufino Contreras, the UFW called off picketing for several days "to cool it off" and Chavez spent over a week talking to people in large and small groups and individually, urging them not to retaliate for Contreras's death.

There was evidence that the UFW could discipline picketers who violated strike rules by pulling them off the picket line and having them work elsewhere yet the evidence tended to show the UFW rarely disciplined picketers.[8] Maggio strike coordinator King who had responsibility for directing where the picketers went and for supervising the picket captains was unable to recall any Maggio worker being disciplined and stated he had never had a problem with a Maggio picket.

There was evidence that on the first day of violence, January 29, only four days after the UFW had sanctioned the strike against Maggio, King was identified as being one of the strikers who attempted to block the Mutual Harvest Effort workers from leaving the grounds of a grower where they had assembled to go out into the fields. At trial, King admitted he participated in blocking the road and that he knew his act was illegal. He explained he helt it was for a "higher purpose." While King also testified he never "recommended that other Maggio workers should perform similar acts of disobedience," his actions on January 29 belie that testimony.

There was testimony picket captains encouraged strikers to throw rocks and vandalize grower equipment. In

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[8] The UFW cites testimony in the record to show the UFW disciplined picketers. This testimony consists of Ganz's testimony that discipline of picketers "probably did occur" but he could not remember a single specific instance; Ortiz's testimony that he contemplated removing a strike coordinator of another grower but the coordinator left and some pickets were removed from the picket line for yelling, not following orders "not to cuss back and forth," not attending or bringing beer onto the picket line; picket captain Zamora's testimony that one time he told a picketer "that his conduct was not very good and that it would be good if he went away for a while and that he could come back;" and King's testimony he had heard of strikers being disciplined by Growers Exchange, he told one woman from the Sun Harvest group to "shut up and get out of there" and that he never had any trouble with Maggio pickets.

particular, there was evidence of a "Fantasma" or "Phantom Crew" organized by the strikers to intimidate growers and replacement workers. This phantom crew was composed of five or six "real strong young men" who would use a black van at night to attack replacement workers and to vandalize irrigation equipment, vehicles and homes belonging to growers and replacement workers. There was testimony that not only was King aware of this phantom crew and what they were doing but that he actively recruited UFW members for the phantom crew. King attempted to recruit Rene Vasquez for the phantom crew, telling Vasquez "[i]t was about breaking some cars, do[ing] bad things to the homes."

King was also involved in distributing to picket captains and picketers nail type devices used to cause flat tires. Picket captain Jorge Lopez obtained the devices from a person in Mexicali. At one point, King had the devices in the back of his pickup truck and distributed them in front of the union's office to picket captains. The picket captains, in turn, distributed the tacks to individual picketers.

The UFW asserts: "There was no showing that Union officials actually had knowledge of the identities of those involved or that they failed to respond . . . ." The record, however, shows it was Union officials themselves, e.g., King and picket captains, who were actively involved and encouraging others to become involved in illegal activity and that the Union rarely disciplined any of the strikers, including King and the picket captains, who were involved in illegal activity.[9] Further, the trial

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[9] The UFW points to evidence showing it conducted investigations following major confrontations to determine what had occurred but these investigations resulted in conflicting stories as to who instigated the conflict and what happened. Richard King, for example, testified that on one day the sheriff pointed out to him a striker who had been throwing rocks. When King approached the individual and

court was entitled to infer from the fact that Ganz and other top union officials were often on the picket lines, participated in meetings with the sheriff and from the fact that the Union sometimes posted bail for UFW members who had been arrested, that even the top Union officials were aware of the illegal strike activity. The Union's claim it had only after-the-fact knowledge and an inability to control any of the UFW strikers was rejected by the trial court based on substantial evidence and reasonable inferences drawn from that evidence.[10]

C.

Comparative Negligence

The UFW contends the trial court erred in not applying comparative negligence principles to this case. The

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asked if he had been throwing rocks, the individual denied it. The Union complains it would be unreasonable to expect the Union "to discipline strikers without proof of wrongdoing simply to insulate itself from a possible finding of negligence." It was not unreasonable, however, for the court to disbelieve the Union was seldom able to identify union members involved in illegal activity given the evidence that the union officials, including Ganz, strike coordinators and picket captains were physically present when illegal activity occurred.

[10] The UFW attempts to distinguish cases where damages were awarded against a union for the tortious activities of its members by pointing to specific facts found in those cases which are allegedly absent here. (E.g., *Kayser-Roth Corp.* v. *Textile Workers of America*, *supra*, 479 F.2d 524 [the UFW explains this case "contained clear proof that the two union officials on the picket line instructed the pickets that they should stop non-strikers from entering the plant 'by any means they could, including stripping off their clothes' "]; *Charles D. Bonnano Linen Service, Inc.* v. *McCarthy*, *supra*, 708 F.2d 1 [the UFW explains this case involved "many instances of violence before 1976, and at least eight instances during that year" and findings "that the union's representative on the strike line actually participated in the threats and acts of violence"].) The fact that these cases may have involved other, and perhaps stronger, evidence to support a finding of an award of damages against the union for tortious conduct does not preclude a finding of liability here.

comparative negligence the UFW points to is the alleged negligence of Maggio and the Mutual Harvest Effort to control violence and provocative conduct by security guards and other grower personnel. The UFW argues:

> "Since the act of strike breaking is inherently provocative and confrontation can reasonably be expected, *some* steps should have been taken to ensure that both sides of the dispute remained calm. It was apparent that the Mutual Harvest effort was formed without any procedures to control or regulate its principals, agents, employees and security guards during the harvesting actiivty." (Italics by the UFW, fn. omitted.)

There are several answers to this contention. First, the trial court rejected a finding Maggio or the Mutual Harvest Effort were negligent; the court found "plaintiff's conduct was not a contributing cause of plaintiff's loss." Therefore, the court did not need to apply comparative negligence principles (or, alternatively, implicitly apply the principle, finding zero comparative negligence by Maggio).

Second, the trial court here found the UFW liable based on theories of (1) negligent supervision of the strike and strikers and (2) intentional conduct in authorizing, participating in and ratifying regular, consistent and repeated acts of unlawful picketing. Maggio and the Mutual Harvest Effort had neither the authority nor ability to intervene in the UFW's supervision or discipline of strikers who engaged in illegal activity. Nor did Maggio or the Mutual Harvest Effort participate in the UFW's actions in authorizing, participating in or ratifying illegal conduct by the strikers. In other words, Maggio was not a joint tortfeasor with the UFW for failing to negligently supervise the strikers or in au-

thorizing, participating in or ratifying illegal strike activity by the strikers.[11]

D.

Hearsay Statements of Contractors

The UFW contends the court erred in allowing labor contractors to testify potential replacement workers for Maggio told them they would not work for Maggio because of fear of the violence associated with the strike. The UFW contends the court erred in allowing this testimony to come in under the state of mind exception to the hearsay rule.[12]

Initially, we note the court did not overrule all of the UFW's objections to labor contractor testimony as to why workers did not want to work for Maggio. The court correctly limited the admissibility of the testimony, as acknowledged by the UFW, when the UFW made its second objection, thus indicating the court did not improperly consider the evidence.

More importanly, there was other evidence indicating replacement workers were afraid and there was evidence the UFW engaged in activity designed to frighten those working for Maggio. We conclude that even if the court

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[11] This is not to say that grower personnel did not engage in any tortious activity or to say that the UFW could not have counterclaimed for personal injuries or property damage incurred by strikers and paid for by the UFW which were due to the actions of Maggio's personnel, but only that as far as the actions of the strikers were concerned, the trial court was not required to conclude Maggio had any liability for the damages caused by the illegal conduct of the strikers.

[12] Under Evidence Code section 1250, subdivision (a), a statement of a then-existing state of mind or emotion is not made inadmissible by the hearsay rule if "(1) [t]he evidence is offered to prove the declarant's state of mind, emotion or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) [t]he evidence is offered to prove or explain acts or conduct of the declarant." (Evid. Code, § 1250, subd. (a).)

erred in allowing one labor contractor to testify as to hearsay statements of workers, reversal on this ground is not required because the error was harmless.

II

Damages

A.

Separation of Damages Due to Lawful Versus Unlawful Union Conduct

The UFW contends the court erroneously awarded damages Maggio suffered due to legal activity by the union.

The trial court, in awarding damages, stated the UFW "was not the sole cause of plaintiff's failure to cultivate and harvest its crops," but that the union's "unlawful conduct was a substantial cause of plaintiff's loss materially contributing to plaintiff's injury."

The trial court found the union's illegal activity was a proximate cause of Maggio's losses [13] and that once Maggio "met its burden of proof that the unlawful strike activity was a substantial cause of plaintiff's damage, the burden then shifted to defendant to show the extent of its contribution to plaintiff's damages, i.e., distinguish

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[13] The trial court explained: "The court finds that defendant union was not the sole cause of plaintiff's failure to cultivate and harvest [its] crops, but does find that defendant's unlawful conduct was a substantial cause of plaintiff's loss materially contributing to plaintiff's injury.

"Defendant union was the cause of plaintiff's inability to harvest crops in the following ways:

"a. Defendant created a climate of violence which prevented plaintiff from recruiting sufficient workers to harvest its crops.

"b. Defendant's violent conduct toward such harvesting activity as plaintiff was able to mount rendered that harvesting activity inefficient in certain cases and impossible in others where plaintiff was unable to provide adequate security." (Paragraph numbers omitted.)

the damages caused from lawful conduct from the damages caused by unlawful conduct." The court concluded the UFW had not met this burden.

The UFW argues that damages are limited to the "direct consequences" of violence or threats of violence and contends Maggio had the burden of proving what damages it suffered due to the "direct consequences" of the illegal activity, a burden which Maggio did not sustain. The UFW contends the court improperly shifted the burden of separating the losses to the Union based on an erroneous reliance on *Fibreboard Paper Products Corp.* v. *East Bay Union of Machinists* (1964) 227 Cal. App.2d 675 [39 Cal.Rptr. 64].

In *Fibreboard*, a manufacturer fired all 70 of its maintenance employees because the manufacturer decided to contract out the work to an independent contractor. Fifty of the seventy fired employees were union members. To protest the firing, the local and international unions authorized and established a picket line at the manufacturing plant. The picketers blocked the entrance to the plant, threatened and assaulted replacement workers and prevented the warehousemen, who moved raw materials necessary for production of the company's product, from performing their work. The manufacturer sought, and was awarded by the jury, damages for lost profits caused by tortious activity of the union. The *Fibreboard* court stated:

> "Assuming *arguendo* that implicit in the jury's verdict is a finding that the warehousemen stayed away from work both because of fear of violence and union principle, we do not believe it was incumbent upon Fibreboard to show what portion of its damages was caused by the tortious conduct and what part was attributable to the nontortious. We doubt that such a showing could be made. The applicable rule is that one who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured. [Citations.]

> It is not necessary that the negligence of the defendant be the sole proximate cause of the damage, but there may be other factors which contribute to the extent of the damage. It is sufficient that such negligence be one of the contributing causes thereof. [Citations.] . . . While it is incumbent upon the party alleging injury to prove the amount of damages, if the damages proven could be reduced proportionately, that burden rests upon the defendant. [Citation.] Prosser states the applicable principle as follows: '[W]here it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest on him to show the extent of this contribution, and that if he cannot sustain it he should be liable for the entire loss.' [Citation.] In more emphatic language, we find the principle stated in *Navigazione Libera T.S.A. v. Newtown Creek T. Co.*, 98 F.2d 694, cited in *Cummings* as follows: '"[W]hen one of the two contributing factors is not the result of actionable fault . . . the single tortfeasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong."' [Citation.] In the light of the applicable principles Fibreboard has sustained its burden, but the record does not show that defendants have sustained theirs." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, supra*, 227 Cal.App.2d at pp. 704-705.)

This language in *Fibreboard* fully supports the court's position but the UFW argues *Fibreboard* is no longer good law because "*Fibreboard* issued *two years before*, the controlling case on the subject: *United Mine Workers* v. *Gibbs* (1966) 383 U.S. 715. . . ." (Italics by the UFW.) The UFW explains *Gibbs* limits an employer's recovery against a union for tortious activity to the damages *directly* caused by the violent or otherwise unlawful picketing.

Contrary to the UFW's contention, *Fibreboard* remains good law and is controlling here. Not only has the *Fibreboard* holding been cited with approval after the *Gibbs* decision by our Supreme Court (see *Haft* v. *Lone Palm Hotel* (1970) 3 Cal.3d 756, 774 [91 Cal.Rptr. 745, 478 P.2d 465]), but *Gibbs* itself supports *Fibreboard.*

In *Gibbs*, the Supreme Couprt reversed an award of damages against a union because the evidence showed that the only violence that had occurred during the strike occurred on the first day when no representative of the international union was present and that as soon as the international union learned of the violence, it sent a representative with instructions to prevent further violence and no further violence occurred. In analyzing the law upholding peaceful picketing and permitting damages caused by tortious conduct of picketers, the *Gibbs* court reviewed a case, *Milk Wagon Drivers Union, Etc.* v. *Meadowmoor Dairies* (1941) 312 U.S. 287 [85 L.Ed. 836, 61 S.Ct. 552, 132 A.L.R. 1200], which had upheld an injunction against picketing because the peaceful picketing had become "enmeshed with contemporaneously violent conduct which is concededly outlawed." The *Meadowmoor* case reasoned the injunction could properly issue because "acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence." (*Id.* at p. 294 [85 L.Ed. at p. 842].) The *Meadowmoor* court noted the case before it "was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful." (*Ibid.* [85 L.Ed. at p. 842].) The United States Supreme Court in *Gibbs*, when it considered the application of the *Meadowmoor* case involving an injunction to the situation in *Gibbs* involving a claim for damages, stated:

> "Such special facts, if they appeared in an action for damages after picketing marred by violence had

> occurred, might support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered. Where the consequences of peaceful and violent conduct are separable, however, it is clear that recovery may be had only for the latter." (*Mine Workers* v. *Gibbs*, *supra*, 383 U.S. 715, 731-732 [16 L.Ed.2d at p. 231], fn. omitted.)

Thus, the United States Supreme Court in *Gibbs* acknowledged an award of damages for all losses occurring during a strike would be proper when, as here, the consequences of peaceful and violent conduct are not separable.[14]

As the Ninth Circuit explained in *Frito-Lay, Inc.* v. *Local U. No. 137, Intern. Broth.* (9th Cir. 1980) 623 F.2d 1354, 1362-1363, certiorari denied 449 U.S. 1013, 1112 [66 L.Ed.2d 472, 841, 101 S.Ct. 571, 922]:

> "'[W]hen a union exerts economic pressure to achieve both lawful and unlawful objectives and the consequences were not separable, damages cannot be recovered unless the unlawful objective was a substantial cause of the pressure.' [Citation.] Appellants claim that the underlying object of the strike was lawful—to obtain increased economic benefits for its members—even though the attempt to force multi-employer bargaining was unlawful. They argue that to recover damages Frito-Lay must either

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[14] The UFW complains the trial court did not make an explicit finding the losses were not separable. While the trial court did not use the specific word "separable," that clearly was its determination. The court found the illegal conduct of the strikers had created a "climate of violence," proximately caused Maggio's damages, was a substantial cause of the damage and shifted to UFW the burden of distinguishing the damages due to legal versus illegal conduct. Implicit in these determinations is a finding the damages were not separable. (Contrast, *Stryjewski* v. *Local Union No. 830, Brewery, etc.* 451 Pa. 550 [304 A.2d 463].)

(1) distinguish between the effects of the legal and illegal objectives, or (2) if those effects are not separable, establish that the strike would not have occurred absent the illegal objectives.

"[Our earlier decision] does not require that the illegal object be the sole cause of the strike, only that it be a 'substantial' cause or that it 'materially contribute' to the injury, 'notwithstanding other factors contributed also.' [Citation.] The Union's argument misapprehends the principles applicable to proof of causation in cases such as this. The controlling rules derive from tort law principles where more than one factor can be a substantial cause, and no single factor need be the sole causative element. Here the district court properly found the illegal objective to be at least a substantial—if not the sole—cause of the strike; from this the court could reasonably infer a causal relationship between the illegal objectives and the damages attributable to the strike." (*Frito-Lay, Inc.* v. *Local U. No. 137, Intern. Broth., supra*, 623 F.2d at pp. 1362-1363.)

The evidence here supports a finding the illegal activity by the Union and its members was a substantial cause of all the losses suffered by Maggio and that the losses were not separable between those due to legal conduct and those due to illegal conduct.[15] The UFW's own witness on damages, Mark Lumer, made no attempt to so segregate the losses, admitting that with the knowledge he had, "it was not possible to make the separation between the legal and the illegal portions." [16]

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[15] The UFW in a related argument, contends the court erroneously attributed damages to the activity of the strikers rather than to Maggio's inability to recruit sufficient replacement workers at the very outset of the strike and to the lesser skills and efficiency of the replacement workers. This argument also is addressed to the ability to separate damages and is not a basis for reversal.

[16] The UFW contends the shifting of the burden of proof denied it due process. The UFW argues "once Maggio demonstrated that

B.

Crop Losses

The trial court awarded damages for losses Maggio suffered in its carrot, lettuce and broccoli fields. The UFW has numerous complaints about the damages award.[17]

Ordinary Business Risk

The UFW first complains that the court erred in awarding damages for lost profits based on the UFW's negligent supervision because: "even assuming the court correctly found that defendant breached its duty of ordinary care . . . , and that damages were proximately caused thereby . . . , the award of damages for lost profits for the crop losses (prospective economic advantage) is improper because the injury suffered was precisely plaintiff's *ordinary business risk.*

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some picket line misconduct caused *some* losses, rather than presuming that some losses flowed from constitutionally and statutorily protected picketing, the Court, presumed that misconduct caused all claimed damages." To support its claim this resulted in a deprivation of due process, the Union cites *Speiser* v. *Randall* (1958) 357 U.S. 513 [2 L.Ed.2d 1460, 78 S.Ct. 1332], *People* ex rel. *Gow* v. *Mitchell Brothers' Santa Ana Theater* (1981) 114 Cal.App.3d 923 [171 Cal. Rptr. 85] and *Van Atta* v. *Scott* (1980) 27 Cal.3d 424 [166 Cal.Rptr. 149, 613 P.2d 210]. These cases are distinguishable. They involve the burden of proof imposed on the government when it prosecutes individuals for matters touching on Free Speech (*Speiser* v. *Randall, supra; People* ex rel. *Gow* v. *Mitchell Brothers' Santa Ana Theater, supra*) or incarcerates individuals before trial (*Van Atta*). As discussed in the text, *ante*, the courts, while recognizing a union's right to peacefully picket, have required the union to bear the burden of segregating damages once the plaintiff has shown the union's tortious conduct was a substantial cause of its losses.

[17] Among other complaints, the UFW contends damages for lost profits could not be awarded based on a trespass claim or based on interference with business relations. Maggio sued on these theories, but the trial court awarded damages based on theories of negligent supervision and intentional conduct.

> "Maggio's conduct reflects a conscious decision to take a strike rather than come to terms with the union. Under these circumstances, a risk of losing profits is a given—Maggio and his fellow growers took steps to minimize that loss, a loss that was fully anticipated. Maggio knew he would not be able to harvest his entire crop under strike conditions . . . . He took an *ordinary business risk*, and as expected, he was not able to harvest all of his lettuce, carrots and broccoli."

The UFW bases this argument on language pulled out of the Supreme Court's decision in *J'Aire Corp.* v. *Gregory* (1979) 24 Cal.3d 799 [157 Cal.Rptr. 407, 598 P.2d 60], a case involving a claim by a tenant for damages to a prospective economic advantage negligently caused by a contractor who was not diligent in performing construction work. In the course of the opinion, the Supreme Court explained: "The chief dangers which have been cited in allowing recovery for negligent interference with prospective economic advantage are the possibility of excessive liability, the creation of an undue burden on freedom of action, the possibility of fraudulent or collusive claims and the often speculative nature of damages. [Citations.]" (*Id.* at pp. 807-808.) The Supreme Court concluded in *J'Aire*:

> "However, the factors enumerated in [*Biakanja* v. *Irving* (1958) 49 Cal.2d 647 (320 P.2d 16, 65 A.L.R. 2d 1358)] and applied in subsequent cases place a limit on recovery by focusing judicial attention on the foreseeability of the injury and the nexus between the defendant's conduct and the plaintiff's injury. These factors and ordinary principles of tort law such as proximate cause are fully adequate to limit recovery without the drastic consequence of an absolute rule which bars recovery in all such cases. [Citation.] Following these principles, *recovery* for negligent interference with prospective economic ad-

> vantage *will be limited to instances where* the risk of harm is foreseeable and is closely connected with the defendant's conduct, where damages are not wholly speculative and *the injury is not part of the plaintiff's ordinary business risk.*" (*J'Aire Corp.* v. *Gregory, supra*, 24 Cal.3d at p. 808, italics added.)

While suffering losses due to a lawful strike might be "an ordinary business risk," the damages here were awarded for illegal and violent conduct by strikers. The law specifically recognizes such conduct by strikers as tortious and as a basis for recovering damages. We have found no cases deeming tortious activity to be "an ordinary business risk," the UFW has not cited any cases to support its position and nor would be inclined to adopt such a holding as it runs counter to public policy requiring wrongdoers to be liable for their torts.

The "New Business" Rule

The UFW next complains the trial court erred because it did not apply "the new business" rule when it calculated Maggio's lost profits.

"[I]n order to support a lost profits award the evidence must show 'with reasonable certainty both their occurrence and the extent thereof.' [Citation.]" (*Sanchez-Corea* v. *Bank of America* (1985) 38 Cal.3d 892, 907 [215 Cal.Rptr. 679, 701 P.2d 826], italics deleted.) Damages for loss of profits may be denied to an "unestablished" or new business as being too uncertain and speculative if they cannot be calculated with reasonable certainty. (*S. Jon Kreedman & Co.* v. *Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173, 184-185 [130 Cal.Rptr. 41].) "The ultimate test is whether there has been 'operating experience sufficient to permit a reasonable estimate of probable income and expense,' as stated in [*Natural Soda Prod. Co.* v. *City of L.A.* (1943) 23 Cal. 2d 193, 199 (143 P.2d 12)]; or, as phrased in [*Grupe* v. *Glick* (1945) 26 Cal.2d 680, 693 (160 P.2d 832)], 'an-

ticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability.' " (*Edwards* v. *Container Kraft Carton etc. Co.* (1958) 161 Cal.App.2d 752, 760 [327 P.2d 622].) Under this rule, damages for lost profits have been denied to a copyright business that did not exist (*Read* v. *Turner* (1966) 239 Cal.App.2d 504 [48 Cal.Rptr. 919, 40 A.L.R.3d 237]), for a motel that never opened (*Engle* v. *City of Oroville* (1965) 238 Cal.App.2d 266 [47 Cal.Rptr. 630]) for a business which operated only for a few days (*Macmorris Sales Corp.* v. *Kozak* (1968) 263 Cal.App.2d 430 [69 Cal.Rptr. 719]) and for a two-month old partnership which had never received a contract (*Patton* v. *Royal Industries, Inc.* (1968) 263 Cal.App.2d 760 [70 Cal.Rptr. 44]).

The UFW argues Maggio became a new business when the strike occurred because it "was forced to recruit, hire and train an entirely new and for the most part unskilled, work force prior to resuming normal operations." This argument is completely without merit. Maggio was not a new business; it had been growing produce for years in the Imperial Valley. Under the UFW's theory, nearly every breach of contract or tort committed against a business which resulted in lost profits would also result in creating a new business. This is not the view adopted by the law. Cases applying the "new business rule" generally involve businesses which have been in operation only a very short period of time. (See, e.g., *Grupe* v. *Glick*, *supra*, 26 Cal.2d 680, 693 [new venture]; *Edwards* v. *Container Kraft Carton etc. Co.*, *supra*, 161 Cal.App.2d 752 [12 days]; *Patton* v. *Royal Industries, Inc.*, *supra*, 263 Cal.App.2d 760 [2 months].)

Further, even if we were to accept the UFW's argument that Maggio somehow became a "new business" due to the UFW's strike, we would not reverse. The UFW's claim of reversal is based on Maggio's alleged failure to meet the new business rule's requirement of "later profit-

able operation." The UFW argues as if this is an inflexible requirement. While a business's later profitable operation may be probative of the determination of lost profits, it is not a sole or mandatory requirement. It is but one of several factors useful in determining whether the claimed lost profits may be determined with sufficient certainty to be awarded or must be rejected as too specualtive. Here, lost profits could be calculated with reasonable certainty.

Methods of Calculating Crop Losses

The UFW argues the court erred in the method it used to calculate Maggio's crop losses.[18]

Maggio computed its crop losses by: (1) calculating an average yield per acre for broccoli, lettuce and carrots based on averaging yields from fields harvested before the strike for broccoli (376.7 cartons/acre)[19] and lettuce

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[18] Maggio's summary of its damages was contained in plaintiff's exhibit 86. The UFW contends the court erred in admitting exhibit 86 because it was not supported by expert testimony. Exhibit 86 was merely a compilation of data from Maggio's own records or from publications which were entered into evidence or available to the UFW and upon which simple arithmetic had been used. The data used came from Maggio's records or standard publications and were not drawn from expert opinion. This exhibit was properly admitted without expert testimony.

[19] To compute the average yield per acre for broccoli, Maggio chose four of its ten broccoli fields which were harvested before the strike. These four fields were represented to be typical fields. Maggio's calculations are as follows:

Field	Acreage	Yield *(cartons)*	Yield *per acre*
28A	96	38,814	404.3
15D	36	12,767	354.6
34	75	24,053	320.7
9B	31	14,010	451.9
Totals:	238	89,644	376.7

Maggio determined it had been unable to harvest four broccoli fields due to the illegal strike activity for a loss of 99,449 cartons

(625.4 cartons/acre)[20] or on published average yields per acre for the Imperial and Coachella Valleys for carrots (18 tons/acre)[21] (2) multiplying the average yield per acre by the number of acres not harvested due to the strike to obtain the total units lost for each crop; (3) multiplying the total units lost by the midrange of prices published for the crops for the first week each field should have been harvested (4) adding in the cooling revenue lost for the cartons not harvested,[22] and (5) subtracting

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of broccoli (264 total acres × 376.7 cartons/acre) and was only partially able to harvest two other fields for a loss of 31,171 cartons of broccoli (117 acres × 376.7 cartons/acre = 12,903 cartons actually harvested), thus suffering a total broccoli crop loss of 130,620 cartons.

[20] To compute the average yield per acre for lettuce, Maggio used the five lettuce fields which had been fully harvested before the strike. These five fields were represented to be typical fields. Maggio's calculations were as follows:

Field	Acreage	Yield *(cartons)*	Yield *per acre*
29A	43	26,053	605.9
29D	61	38,789	635.9
7A	73	44,917	615.3
30B	75	48,779	650.4
30A	75	45,977	613.0
Totals:	327	204,515	625.4

Maggio claimed it was unable to harvest five lettuce fields which represented 255 acres and thus suffered a lettuce crop loss of 159,477 cartons (255 acres × 625.4 cartons/acre).

[21] To compute the average yield per acre for carrots, Maggio relied on an average yield of 18 tons per acre in the Imperial and Coachella Valleys as published in "Marketing California Carrots, 1980." Maggio calculated the carrots in hundred weights (cwt), using 360 hundred weights per acre. Maggio calculated a loss of 2 carrot fields totalling 154 acres for a loss of 55,440 hundred weight of carrots.

[22] Maggio calculated it lost cooling revenues of $62,697 for broccoli ($.48/carton lost cooling revenue × 130,620 cartons lost); $34,927 for carrots ($.63 net cooling revenue/hundred weight (cwt) × 55,440 cwt); and $36,680 for lettuce ($.23/net cooling revenue per

out harvesting and packing costs which were determined on a per unit basis using published average costs for the Imperial Valley.[23]

The trial court used Maggio's acreage figures, its prices, the average yields per acres for the lost broccoli and lettuce but not for carrots (the court used an average yield of 16.8 tons per acre rather than Maggio's 18 tons per acre) and used slightly higher harvesting costs for lettuce ($2.35/carton v. Maggio's $2/carton) and broccoli ($3.40/carton v. Maggio's $3.20/carton). The trial court also reduced the award by deducting returns and allowances [24]—five percent in returns and allowances for broccoli and carrot and ten percent for lettuce.[25]

Calculation of Average Yield/Acre

The UFW has a number of objections to the court's reliance on Maggio's average yield per acre calculations. The UFW contends there was no evidence to show the fields used to calculate the average yields/acre for broccoli and lettuce were typical. The UFW argues the fields selected "were not typical because they were harvested during a priod when there were abnormalities in price which plaintiff conceded would affect the yields."

Initially, we note the UFW's argument is again based on an unsupported assertion of what the record contains, i.e., that Maggio conceded abnormalities in the price would affect yields. Second, there was evidence showing that Maggio management selected these fields because they

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carton × 159,477 cartons lost) for a total lost net cooling revenue of $134,304.

[23] Maggio used a harvesting cost of $3.20 per carton for broccoli, $6.94 per hundred weight for carrots and $2 per carton for lettuce.

[24] The returns and allowances represent the difference between the gross and net sales figures.

[25] The returns and allowances deducted by the court amounted to $49,372 for broccoli, $27,398 for carrots and $142,425 for lettuce.

were representative of "the best expectation that they had for what they were going to get or what they would have gotten had they not been interfered with." There was testimony that some of the fields harvested before the strike against Maggio was sanctioned were excluded from the calculation because they were affected by slowdowns by the union workers. While the UFW, in cross-examination of Roger Britt, the individual who compiled the crops loss damages for Maggio, showed the average yields per acre would have been lower for the broccoli [26] and lettuce [27] if Britt had used the yields from all the fields harvested before the strike against Maggio was sanc-

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[26] The broccoli fields harvested before the strike was sanctioned which the UFW contends should have been included in Maggio's calculations were as follows:

Field	Acreage	Yield *(cartons)*	Yield *per acre*
28C	8	2,240	280.0
116	70	27,390	391.2
130	32	4,383	136.9
103	40	13,890	347.2
104	38	16,238	427.3
109	52	16,052	308.6
	240	80,193	334.1

Excluding fields 28C, 130 and 109 (fields with significantly lower yields) from the calculations, results in a yield of 388.6 cartons/acre, significantly higher than Maggio's use of 376.7 cartons/acre.

If one combines the total cartons harvested from all the fully harvested prestrike broccoli fields, both those used by Maggio (89,644 --see *ante*, fn. 19) and those the UFW contends should also have been considered (80,193), and divide the total yield of 169,837 by the total acreage of 478 (237 from the fields Maggio used plus 240 from the fields the UFW contends should have been included), the result is a yield of 355.3 cartons/acre.

[27] In calculating the average yield per acre for lettuce, Maggio excluded two lettuce fields which had been partially harvested before the strike:

tioned, the difference was not so great, particularly in light of testimony indicating some harvesting was affected by work slowdowns, so as to compel the court to reject Maggio's calculation of the average yield per acre as being an unreliable indicator of the yield per acre Maggio would have received on the fields it was unable to harvest because of the illegal strike activity.

The UFW also contends the trial court should have rejected Maggio's estimated yields/acre because they differed from yields reported in the Federal-State Marketing News Survey (FSMNS)[28] and from Maggio's own esti-

Field	Acreage	Yield	Yield
		(cartons)	*per acre*
4A	31	9,285	299.5
7C	72	23,519	326.6
	103	32,804	318.5

When combined with the yields from the fully harvested prestrike lettuce fields (327 acres yielding 204,515 cartons of lettuce), the yield becomes 551.9 cartons per acre (237,319 cartons divided by 430 acres).

[28] The FSMNS for broccoli yields in the Imperial Valley showed:

Year	Yield per Acre
1978	278 cartons (Coachella and Imperial Valleys)
1979	165 cartons
1980	290 cartons
1981	257 cartons

The FSMNS for carrot yields in the Imperial Valley showed:

Year	Yield per Acre
1977	16.7 tons
1978	16.5 tons
1979	15.6 tons
1980	18 tons
1981	19.1 tons
1982	21.8 tons
1983	20.8 tons

The FSMNS for lettuce yields in the Imperial Valley showed:

mate of yields contained in a 1978 loan application.[29]

Initially we note the court awarded damages for the lost carrot crop based on the FSMNS.[30] Second, while it may be true that the use of the FSMNS or Maggio's pre-harvest estimates may be valid methods of estimating what yields Maggio would have otherwise obtained in 1979, we cannot say, as a matter of law, that either method is required or that the method used by Maggio and adopted by the court must be rejected. We find no reversible error in the method the court used to calculate the crop yields.

Calculation of Prices for Lost Crops

The UFW complains the damages awarded to Maggio resulted in windfall profits because not only did the trial court award damages for all crop losses occurring during the strike but calculated damages for the lost lettuce fields based on the high prices of the strike year.

The evidence presented at trial indicated the 1979 prices for lettuce were higher than other years. Carl Maggio admitted at trial that "during the 1979 lettuce

Year	Yield per Acre
1977-1978	502 cartons
1978-1979	475 cartons
1980-1981	449 cartons
1981-1982	504 cartons.

[29] In 1978 Maggio submitted a loan application to obtain funds to grow and harvest its crops and joint venture crops. The application contains an estimate of the expected yields per acre and prices per unit which Maggio expected to receive. Maggio estimated it would obtain 300 cartons of broccoli per acre to sell at $5.80 per carton, 500 cartons of lettuce per acre to sell at $3.58 per carton and 650 sacks of carrots which to sell at $4.20 per sack.

[30] The court awarded damages for the lost carrot fields based on an average yield of 16.8 tons per acre. This amount is the average of the FSMNS yields for 1979 (15.6 tons per acre) and 1980 (18 tons per acre).

season other growers that were not struck probably made a lot of money" and that the UFW strike contributed to making the lettuce market profitable. The FSMNS attributed the rise in lettuce prices in 1979 as due, in part, to the strike. The UFW also presented evidence indicating that the use of the strike prices plus the yields suggested by Maggio resulted in an award of damages to Maggio that gave Maggio profits greater than it had received in years before and after the strike.[31]

However, there was also evidence that increases in the lettuce price were additionally due to frost damage and a hiatus in the October planting due to heavy rains. There was evidence the broccoli prices for 1979 were not so disparate with the four-year average price as were lettuce prices, and, in fact, broccoli prices were lower than the average price at certain points during the 1979 season. The UFW does not object to the carrot prices as being excessive.

In arguing the court improperly awarded damages based on the high prices for lettuce in 1979, the UFW ascribes all of the price increase to the effects of the strike. The trial court, however, was not required to accept the UFW's position that all the increase was due to the strike and not to weather, and planting conditions. Essentially, the UFW is asking us to reweigh the facts

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[31] For example, the UFW presented evidence that Maggio's tax returns showed the following:

Year	Loss/Gain
1976	($528,438) loss
1977	$474,701 gain
1978	($154,242) loss
1979	$394,734 gain
1979 with loss claim:	$2,272,000 gain

Maggio's books showed its Imperial Valley division for 1978 had an operating loss of $501,382 and a profit of $76,701 in the year ending July 31, 1979. If the damage award of $1,679,453 is added to the 1979 profit, then Maggio shows a profit for 1979 of $1,776,154.

and to make a factual determination as to what portion of the 1979 lettuce prices reflect the strike activity as opposed to weather and other factors. As we have stated before, it is not our function to act as the fact finder or to reweigh the evidence presented to the trial court. We conclude that given the evidence that the strike was but one factor causing an increase in lettuce prices, indications that broccoli and carrot prices were not so inflated by the strike and the UFW's failure to establish the part of the price increase caused by lawful strike activity, the trial court was entitled to conclude the strike was a lesser factor in the price rise and to use the 1979 lettuce prices rather than the four-year average suggested by the UFW.[32]

C.

Collateral Source Rule

The UFW complains the court erred in applying the collateral source rule to preclude an offset of the damages by the amount Maggio received from the Fair Negotiating Committee.

The Fair Negotiating Committee was formed on January 31, 1979 by produce growers in California and Arizona. Under the Fair Negotiating Committee agreement, the growers agreed to pay to the committee a portion of each carton sold.[33] This money was intended to reimburse

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[32] The UFW also compalins the court improperly awarded cooling revenue to Maggio because Maggio's cooler was shut down at the beginning of the strike because cooler workers refused to work. The cooling revenue is the amount Maggio charged for cooling (either hydrocooling or vacuum) his produce. Maggio cooled all his produce. Maggio testified the cooling process is automated and requires little human labor. Based on this evidence, the court could conclude Maggio would have obtained the revenue from cooling had the harvesting not been interfered with by the tortious activity of the union.

[33] The maximum amount of the assessments were set as follows in the Fair Negotiating Committee Agreement:

growers who were unable to harvest lettuce due to strike activity at a rate of up to $1,100 per acre for unharvested lettuce. The Fair Negotiating Committee agreement also provided the committee "shall return any part of assessments as may be necessary under ARTICLE V [involving disbursements for crops unharvested due to strike activity] and shall issue calls for assessments from the appropriate participants on a weekly basis to provide funds for those purposes." Maggio paid assessments of $51,784.50 and received payments of $564,575 from the Fair Negotiating Committee.

Under the "collateral source rule" when a person has suffered a personal injury or property damage due to the wrongful act of another, "an action against the wrongdoer for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer. [Citations.]" *Anheuser-Busch, Inc.* v. *Starley* (1946) 28 Cal.2d 347, 349 [170 P.2d 448, 166 A.I.R. 198].) The collateral source rule reflects a policy judgment encouraging individuals to purchase insurance, functions to prevent juror confusion in assessing general damages and overcomes the plaintiff's disadvantage resulting from the usual attorney's contingent fee contract where a large portion of the recovery goes to the attorney rather than to compensate the plaintiff as the jury may have intended. (*Helfend* v. *Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 11-12 [84 Cal.Rptr. 173, 465 P.2d 61, 77 A.L.R.3d 398].) The rule applies "in tort cases in which the plaintiff has been compensated by an inde-

Market Price per Carton	Assessment
$3.00	$ .25
3.50	.50
4.00	.75
4.50	1.00
5.00	1.50
Above 5.00	50% of Price above 5.00

pendent collateral source—such as insurance, pension, continued wages, or disability payments—for which he had actually or constructively . . . paid or in cases in which the collateral source would be recompensed from the tort recovery through subrogation, refund of benefits, or some other arrangement." (*Id.* at pp. 13-14.)

Here, the Fair Negotiating Committee was a source independent and collateral from the UFW, its members or other wrongdoer. It was akin to insurance, i.e., a pooling of resources by individuals to provide a fund to pay losses due to certain risks (lost crops due to strike activity). The UFW attempts to avoid the collateral source rule by pointing to an individual's duty to mitigate damages, arguing formation of the Fair Negotiating Committee was an attempt to mitigate damages and concluding, therefore, the payments made by the Fair Negotiating Committee should be offset against the award against the UFW. This argument, however, would apply equally in the traditional insurance context, i.e., that the insured, fearing possible losses might occur in the future attempts to mitigate his possible future losses by obtaining insurance. The Supreme Court has clearly held the collateral source rule applies to insurance payments made in tort cases. We believe the trial court correctly ruled the Fair Negotiating Committee payments were from a collateral source and therefore would not reduce the judgment.

D.

Security Guard Expenses

The UFW contends the court improperly awarded Maggio all its claimed security guard expenses. The UFW asserts the claimed expenses included Maggio's normal security costs and costs which were not due to illegal strike activity.

The UFW points out Maggio normally maintained a year round security force, Carl Maggio testified the deci-

sion to hire additional security was based on the January 29 confrontation and he "did not mention a single other incident which influenced his decision to increase security." The UFW also points to the testimony of Maggio Vice-President George Stergios who testified when he was in charge of selecting guard positions he placed guards "wherever we had people working that we thought it would be unsafe or we had equipment that needed protecting." The UFW then argues:

> "Although Maggio claimed he did not intend to have that kind of security for the carrot harvest, he prior to January 29, *so it is likely that he would have done so* for the carrot operation as well, regardless of whether anything occurred on January 29th. Maggio simply expended more in February as the company's activities expanded to more locations in the fields and shed as more personnel crossed picket lines." (Italics added.)

Initially, we note the UFW has not cited the record to support its assertion Maggio "in fact arrange[d] for security . . . prior to January 29." (16) The UFW, as the appellant, bears the burden of showing reversible error and when, as here, the error is addressed to the sufficiency of the evidence, must set out a fair and adequate statement of the evidence which is claimed to be insufficient with citations to the record. (See *Brown v. World Church* (1969) 272 Cal.App.2d 684, 690-691 [77 Cal. Rptr. 669, 45 A.L.R. 3d 622].) The UFW cannot shift this burden to Maggio nor expect the reviewing court to undertake an independent examination of the record. (*Id.* at p. 690-691). (15b) Thus, to the extent, the UFW's argument depends on unsupported characterizations of the evidence presented to the court, we need not address the arguments.

Additionally, we note the UFW's assertion the trial court improperly awarded security costs which would have occurred even without the violence or threats of

violence, is based on speculation, i.e., the UFW's speculation that although Maggio claimed he did not intend to have security for the carrot harvest "it is likely that he would have done so" regardless of the incidents of January 29. Here, there was evidence Maggio hired additional security guards because of the January 29 incident. The trial court was entitled to believe that testimony.

Finally, we note at the outset of the trial when the UFW argued Maggio should not be allowed to recover for any of its normal security costs or for security costs incurred before the first violence on January 29, Maggio agreed and stated it would not seek reimbursement for normal security costs incurred before January 29. The UFW has not cited evidence showing the claim was not as represented. No reversal is required on this ground.

E.

Housing Costs

The UFW contends the court improperly awarded Maggio the costs of housing replacement workers in a motel. The UFW contends the housing costs were not justified because: (1) there was no illegal activity by the strikers which required housing replacement workers in motel rooms rather than the labor camp; (2) Maggio failed to show the costs of housing replacement workers in a motel was higher than the costs Maggio otherwise would have incurred for housing workers and (3) the court improperly awarded housing costs incurred before February 26.

The record shows night picketing occurred at the Sanchez labor camp beginning on February 5 and continuing until the early morning hours of February 9. The picketing began around sunset and continued until 3 or 4 a.m. and resulted in numerous reports of rock throwing by the picketers. On February 8, there was a

gun fired towards the camp by one of the picketers.[34] There was other evidence indicating UFW strikers followed replacement workers to their homes, threatened to burn down their homes and hurt the families of replacement workers, burned or damaged vehicles or homes belonging to replacement workers and physically assaulted replacement workers near their homes. The UFW leadership was involved in organizing the night and residential picketing and was involved with the "Phantom Crew" which engaged in illegal activity against replacement workers at night and near their homes.

Based on this record, the trial court could reasonably conclude the UFW was involved in illegal strike activity against the replacement workers at the labor camps and near their residences and that a threat of violence continued after the nighttime picketing was halted at the Sanchez labor camp. The court could further conclude this threat was particularly acute against the group of Arab replacement workers brought in from Delano whom the UFW identify as "the first real worker crew to break the strike" and whom Maggio housed at the motel.

The UFW contends the court's award of housing costs was improper because Maggio failed to establish the cost of housing workers at a motel was higher than normal worker housing costs. This contention presupposes Maggio normally paid the housing costs of its workers. The UFW, however, does not cite any evidence in the record to support this supposition or to show error by the court. We therefore assume the judgment is correct in this respect.

Finally, the UFW complains the court awarded Maggio housing costs incurred before February 26 even though Maggio conceded it was not entitled to housing

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[34] There was also evidence suggesting that shots were fired by the replacement workers towards the picketers.

costs incurred before that date. Maggio responds by reaffirming its position that it was requesting only housing costs incurred after February 26 and points to plaintiff's exhibit 73 as support. Plaintiff's exhibit 73 is a compilation of housing costs listing payments by Maggio check number, amount, date paid and housing period covered. As the UFW points out, included on plaintiff's exhibit 73 is Maggio check number 7395 for $1,008 paid on March 15, 1979 to cover "Rent for bunch workers for February, 1979, 28 days @ 36.00/day, 2 rooms, Park Manor Hotel." Since Maggio agrees it was entitled to housing costs only from February 26, the award should reflect it was entitled to recover on check number 7395 for only two days ($72) rather than twenty-eight ($1,008). Accordingly, the judgment should be reduced by $936 ($1,008-$72).

F.

Property Damage

The UFW complains about the court's award of property damages, contending plaintiff's exhibit 74 does not support the award. The UFW argues:

> "Angulo [a bookkeeper for Maggio] simply prepared PX 74 by going through the vendor files to ascertain what invoices pertained to 'damages *during* the strike' (RT: LXIII, 16,314). Apparently neither she nor plaintiff's counsel cross-checked the list with the testimony to establish that plaintiff had in fact established a nexus between the damages and the union." (Italics by Union.)

This argument is contradicted by the record where Maggio's counsel explained:

> "There were substantially more vehicle incidents that were put into evidence in this case. Some of them were stricken by the court, others simply were not considered because of a lack of a nexus, this list

> has simply been prepared from those items that were permitted by the court to come into evidence with an appropriate witness being present as to either the victim or a witness to the specific incident."

Nonetheless, the UFW contends "the record is totally void of evidence that the '*union* directly damaged vehicles', and there is scant evidence upon which to base most of the claims." This assertion is made in the opening brief and is unsupported by any citations to the record. In its reply brief, the UFW objects to awards for specific items of property damage: (1) $161.13 for damage to sprinkler trailer tires because it was not shown the damage was caused by the Union; (2) $464.65 for damage to windows of Maggio vehicles on February 4 because the record does not support that kind of damage on February 4; (3) $1,125.41 for damage to the windows ($201.25) and body ($924.16) of a 1979 Ranchero because, the UFW asserts, this car was assigned to Pepe Carrillo during the strike and he did not testify at trial; (4) $75.26 for damage to the windows of a 1971 pickup truck because there was an insufficient showing the damage was caused by strikers; (5) $149.50 for damage to a 1978 Monte Carlo belonging to a replacement worker because the replacement worker did not witness the damage.

Of these items, there is merit to the UFW's objection to the award for damage to Lopez's vehicle since the court struck his testimony on the subject based on an insufficient showing connecting the damage to the UFW strikers. Accordingly, the award should be reduced by $75.26. As to the other items, there was evidence of other damage to sprinkler trailers and to buses and trucks on February 5 (therefore suggesting the use of the February 4 date as a mere oversight), the UFW's assertion the 1979 Ranchero was assigned to Pepe Carrillo is a bald assertion unsupported by any citation to the record and the reimbursement for the damage to the 1978 Monte

Carlo was suffiicently supported by evidence and inferences drawn from that evidence indicating UFW strikers had damaged the replacement worker's car.

Further, we note the UFW has failed to point out where it objected to the court's calculation of the property damage. In particular, we note the trial court issued an intended decision setting out its intended award for property damage. At that time, the UFW entered objections to nearly every aspect of the court's award, but made none to the proposed property damage award. Nor did the UFW raise its specific objections on appeal until its opening brief, but waited until its reply brief, after Maggio had filed its brief. This conduct could be construed as waiving the objections.

Proceeds from the Mutual Harvest Effort

The UFW contends the court should have reduced the award by the amount Maggio received from the Mutual Harvest Effort.

The Mutual Harvest Effort was a group of eight struck growers who decided to mutually harvest lettuce fields and equally divide the proceeds from the harvesting. Fields to be harvested were selected by a committee based on whether the field was ready for harvest and where it was located.

The UFW argues:

> "In preparing the damage computations, Britt did not take into account the MHE efforts to harvest lettuce. He just focused on the five lettuce fields 'available for harvest at the time of the illegal activity that were never harvested', and simply developed 'data which led to the reasonable expectation' on cost, yield and revenue (RT: LXIX, 17,716). Britt conceded that if he was 'attempting to calculate the overall damages suffered by Mr. Maggio', he would take into consideration the lettuce harvested by Mag-

gio during the strike that came from sources other than his fields. Had Britt taken this lettuce into consideration, Maggio's damage claim would have been offset by net profits for at least 18,149 boxes of lettuce."

Initially, we note the UFW has failed to cite the record to support its argument—there is no citation to where Britt made his "concession" or to support the UFW's assertion that "net profits for at least 18,149 boxes of lettuce" should have been offset.

Second, at oral argument, Maggio represented that it had not sought damages for any of its fields which were harvested by the Mutual Harvest Effort even though the Mutual Harvest Effort was inefficient and Maggio suffered substantial losses on those fields. The UFW did not dispute this point, but argued it was nonetheless entitled to an offset.

The trial court, however, was not required to adopt the UFW's position and interpretation of the evidence. The trial court was entitled to conclude the losses Maggio sustained on fields harvested by the Mutual Harvest Effort was equivalent to the proceeds Maggio received from the Mutual Harvest Effort and therefore a reduction in the damages awarded against the UFW was not warranted. We conclude no reversal is required on this ground.

III

Timeliness of Prosecution

The UFW contends the court erred in denying its motion to dismiss because Maggio had not diligently prosecuted the case.

Maggio and other growers sued the UFW, numerous individuals and 1,500 Does for damages caused by unlawful strike activity on January 28, 1980, one day before the one-year statute of limitations expired. The Union

was properly served on December 20, 1980, after improper attempts at service had been made on May 28, 1980, and August 13, 1980. The UFW filed a demurrer to the complaint which was overruled in February 1981. In September 1981, the growers filed a stipulation, unsigned by the UFW, regarding amendments to the complaint. In November 1982, after several phone calls between counsel, the growers sent the UFW a copy of a proposed amended complaint and one of the growers agreed to dismiss its suit against the UFW. During this period, there were also ALRB proceedings ongoing involving the 1979 strike, with a settlement being reached and thereafter reviewed by the ALRB. In March 1983, the UFW filed a motion to dismiss, claiming the growers had failed to diligently prosecute the action and to bring the case to trial within two years. On May 9, 1983, the growers filed a first amended complaint against the UFW and 1,500 Does. On May 27, 1983, the court denied the UFW's motion to dismiss for lack of diligent prosecution, stating: "A review of the record included communications between counsel leads this court to conclude that there existed reasonable excuse for delay and finds there was lack of prejudice to the defendant."

At the time the UFW's motion was heard, Code of Civil Procedure section 583, subdivision (a)[35] provided in relevant part: "The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed."

The purpose of the statute is to compel reasonable diligence in the prosecution of lawsuits. (*Jensen* v. *Western Pac. R. R. Co.* (1961) 189 Cal.App.2d 593, 596-597 [11 Cal.Rptr. 444].) It is designed to promote "the trial of

[35] Subdivision (a) of section 583 has been recodified as part of a general reorganization of the statutes dealing with dismissals for delay in prosecution (§ 583.410 et seq.; see generally, § 583.100 et seq.) effective January 1, 1985.

cases before evidence is lost, destroyed, or the memory of witnesses becomes dimmed." (*General Motors Corp.* v. *Superior Court* (1966) 65 Cal.2d 88, 91 [52 Cal.Rptr. 460, 416 P.2d 492].)

In ruling on a motion to dismiss because the plaintiff has not brought the case to trial within two years, the trial court should be guided by the policy favoring trial on the merits over a dismissal for failure to prosecute with reasonable diligence. (Cal. Rules of Court, rule 373.) "[A]lthough the interests of justice weigh heavily against disposing of litigation on procedural grounds—a policy we reaffirm—that policy will necessarily prevail only if a plaintiff makes some showing of excusable delay. [Citations.]" (*Salas* v. *Sears, Roebuck & Co.* (1986) 42 Cal.3d 342, 347 [228 Cal.Rptr. 504, 721 P.2d 590], fn. omitted.) The trial court should also consider the prejudice suffered by the defendant. (See *Hurtado* v. *Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1030 [2213 Cal.Rptr. 712] [affirmative showing of actual prejudice required before the dismissal sanction will be approved]; *Wong* v. *Davidian* (1988) 206 Cal.App.2d 264, 270 [253 Cal.Rptr. 675] [affirmative showing of actual prejudice is not required to support dismissal when the delay is unreasonable].)

The trial court has wide discretion in ruling on a motion to dismiss for lack of diligent prosecution and its decision will not be reversed absent an abuse of discretion. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 331 [216 Cal.Rptr. 718, 703 P.2d 58].) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deducted from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin* v. *Brattain* (1988) 44 Cal.3d 474, 478-479 [243 Cal.Rptr. 9002, 749 P.2d 339].) A trial court's decision to deny a motion to dismiss is not as closely scrutinized on appeal as a deci-

sion to dismiss because the law favors decisions on the merits. (See *Corlett* v. *Gordon* (1980) 106 Cal,App.3d 1005, 1012 [165 Cal.Rptr. 524].)

Here, the record shows the UFW had notice of the lawsuit soon after it was filed in January 1980 although it was not properly served until December 1980. In this intervening period, the UFW moved to quash service as improper. Early in 1981, the UFW filed a demurrer which was overruled. The UFW and the growers also exchanged correspondence as to possible amendments to the complaint. In 1982, the UFW and the growers had telephone communications about amending the complaint and the growers sent the UFW a proposed amended complaint. Also during this period there was an ALRB proceeding pending which resulted in a settlement in January 1983. These circumstances of ongoing communications between the growers and the UFW and the pendency of another proceeding before the ALRB support the trial court's conclusion of excusable delay.

The UFW states it was severely prejudiced by the delay because it had difficulty locating witnesses including workers and staff and because witnesses' memories faded.[36] While it may be true that, by the time trial began several years later, the UFW had some trouble locating witnesses and some of the witnesses' memories had faded, this record does not show an abandonment of the litigation by the plaintiffs so as to lull the UFW into inaction. There were continuing contacts between the UFW and the growers from the time the suit was filed until the UFW made its motion to dismiss. During this period, the UFW had the opportunity to locate witnesses and to freeze witness memories by taking depositions.

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[36] The UFW also states it was prejudiced because records relating to the Fair Negotiating Committee were destroyed in 1983. Prejudice flowing from this destruction is minimal given the ruling the Fair Negotiating Committee was a collateral source whose payments would not reduce the amount of the judgment.

We conclude the trial court did not abuse its discretion when it decided the case should be tried on its merits rather than dismissed for a failure to bring the matter to trial within two years.

IV

Sanctions

The UFW requests sanctions for Maggio's assertedly frivolous motion to dismiss the UFW's appeal because the UFW's notice of appeal had not been timely filed. The UFW makes this request in the small print of the very last footnote of the opening brief which merely refers to the arguments made in its opposition to the motion to dismiss. We decline to award attorney's fees. The motion to dismiss was not clearly frivolous nor brought solely to harass or delay.

DISPOSITION

The judgment is modified by reducing the housing cost award by $936 for housing costs incurred before February 26 and by reducing the property damage award by $75.26 for vehicle damage which was not sufficiently linked to the UFW. As modified, the judgment is affirmed. Each side to bear their own costs.

Froehlich, J., and Nares, J., concurred.

APPENDIX C

Fourth Appellate District, Division One, No. D006453
S020256

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

[Filed May 16, 1991]

MAGGIO INCORPORATED,
Respondent

v.

UNITED FARM WORKERS OF AMERICA AFL-CIO,
Appellant

Appellant's petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

/s/ Arabian
Acting Chief Justice

[6110]

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF IMPERIAL

Department No. 3 Honorable L. Harold Chaille, Judge

Case No. 51761

Hearing on Disqualification

MAGGIO, INC.,
Plaintiff

vs.

UNITED FARM WORKERS,
Defendant

REPORTER'S TRANSCRIPT

June 4, 1985

For Plaintiff:

JAY JEFFCOAT
RONALD BARSAMIAN,
Attorneys at Law

For Defendant:

JAY GOULD
ELLEN EGGERS,
Attorneys at Law

[6111]

El Centro, California, Tuesday, June 4, 1985—9:27 a.m.
Department No. 3 Honorable L. Harold Chaille, Judge

THE COURT: The Court will call the matter of Maggio, Incorporated versus United Farm Workers, Case 51761. Good morning.

MR. GOULD: Good morning.

THE COURT: I see you made it, Mr. Gould

MR. GOULD: Yes. Thank you for waiting.

THE COURT: We waited for you. Your co-counsel indicated that we would wait two more minutes before proceeding on your behalf.

This matter is for hearing regarding the disqualification of Judge Lehnhardt. In the previous hearing, the parties, through their counsel, stipulated and agreed that —and a hearing was held on May 30, 1985—that this judge, Judge Chaille, could hear and rule on the disqualification motion.

The Court intends to rule solely on the declarations submitted by the parties and, although not required to do so, will hear oral argument by the defendant, United Farm Workers, and any counsel representing the judge. This is not an adversary type of hearing in which the plaintiff will participate, although we are delighted to have them represented.

Is there anything you wish to bring to the Court's [6112] attention?

MR. GOULD: Yes.

THE COURT: I might add so that you all know that a hearing is not even required, the Court could decide it solely on the declarations, but I do wish an opportunity to have you speak.

MR. GOULD: Your Honor indicated any counsel representing the judge. Is there going to be counsel present representing Judge Lehnhardt?

THE COURT: I haven't heard of any.

MR. GOULD: Just inquiring.

Your Honor, the defendants have read the denial of disqualification and answer by Judge Lehnhardt and, with all due respect to Judge Lehnhardt, the denial, the declaration does not go to the issue posed by the 1984 Amend-

ment to section 170. Prior to 1984, the code provided that the issue was whether the judge could or could not be impartial. The 1984 amendment to section 170.1 and .6 did away with the subjective standard and placed an objective standard whether there was an appearance of partiality or bias, because the statute speaks of a person aware of the fact might reasonably entertain a doubt that the judge would be able to be impartial.

The fact that Judge Lehnhardt indicates that: "I am not partial to plaintiff or to either side in this case" is not the issue. The issue under the amendment is whether a person with knowledge of the facts would entertain the doubt that [6113] Judge Lehnhardt could be impartial.

On Thursday, May 30, 1985, the Imperial Valley Press published an article and the headline of that article was: "Judge Admits Wife Worked in Sheds." I have that article here and I would ask the Court to receive it as an exhibit.

THE COURT: Your motion is denied. I intend to decide this entirely on the declarations submitted by yourself and Judge Lehnhardt.

MR. GOULD: Thank you.

THE COURT: Equally, there is no foundation for receipt of the article.

MR. GOULD: The importance of that headline is not so much for the truth of the headline, "Judge Lehnhardt Admits His Wife Worked in the Sheds," but what it conveys. That is what the new statute is about. The bench and bar are ordered to avoid any appearance of impartiality, any appearance of a conflict of interest, and contained in the declarations, which I believe were filed on Friday, by several of the individuals represented by defendant United Farm Workers, each of those individuals and I urge the Court to find that there is an appearance of impartiality.

I know that the Court doesn't want to grant this motion. I know that no one—

THE COURT: How do you know that?

MR. GOULD: Because—

THE COURT: You haven't heard the ruling of the Court.

[6114] MR. GOULD: Well, I am talking to the Court emotionally, Your Honor. The Court may well grant the motion and I truly believe the Court should, but, sitting as presiding judge in a 3-judge court, after a three-and-a-half months of tying up Department 2, emotionally this is not something that one easily entertains. But, I believe—

THE COURT: Mr. Gould, I call again to your attention the fact that I offered to have the Judicial Council name a judge, preferably from northern California, to hear this matter and all parties concerned, including yourself, agreed that I could hear the matter and you wanted me to hear the matter.

MR. GOULD: I don't disagree with Your Honor, I don't disagree at all, I am only saying that it is an emotionally tough decision.

But, I believe that the matter must be granted because of the appearance, based upon the amendment to section 170, that a result of the failure to disclose the facts, in conjunction with the facts themselves, there is an appearance that a reasonable person would believe or at least entertain a doubt. And the word of the statute is might, not will, might entertain a doubt that Judge Lehnhardt would be able to be impartial.

Thank you for hearing us out.

The COURT: Thank you. There being no appearance except by declaration of the judge, or the county counsel, the [6115] Court will proceed and rule on the matter.

The Court has read and considered the declarations submitted by the defendant and moving party. Judge Lehnhardt has filed an answer and as indicated by his answer, he does not consent to the disqualification. The Court will decide the matter of the declarations submitted and the statements counsel made.

In reading the declarations carefully, I determined that the alleged event took place six years ago and there

was a 2-day period this apparently occurred. The judge had forgotten all about this event. When the issue arose regarding the replacement workers after 32 days of trial, he remembered it and at that time called it to the attention of counsel.

Mr. Gould, I wish to point out something very obvious. We do not live in the colonial days where women's employment is determined by men. Your co-counsel is a woman and I doubt that she disagrees that women have to have the consent of their husbands to do things, I believe that's in a different age. My wife is involved in employment, several outside activities, does not discuss them with me and so far there has been no issue raised regarding that.

I also recall three years ago that a motion to disqualify me was made, not by anybody here, but heard by a San Diego judge, on the basis that I was on the Board of Directors of Woman Haven and, therefore, somehow that influenced my decision because the victim in this particular case was [6115] involved, sheltered in Woman Haven, a shelter for battered wives. In San Diego the judge heard that and quickly disposed of that indicating that frequently in San Diego judges are encouraged to participate in civic outside activities.

And in this particular instance, there is no evidence that Judge Lehnhardt had anything to do with the 2-day workday of his wife and he knew about it at the time and I fail to see in modern society where this would advocate any impropriety or influence the judge might feel in deciding this case.

The Court specifically finds there is no reason why a person would reasonably entertain a doubt that the judge would be unable to be impartial because six years ago the judge's wife worked for plaintiff for a period of two days.

The Court is denying defendant's motion to disqualify Judge Lehnhardt and denying defendant's motion to reinstate the jury trial.

My reason for denying the request to reinstate the jury trial is because a jury trial was never ordered, or a jury was never obtained and the motion is denied on that basis.

In any event, the Court denies defendant's motion to disqualify Judge Lehnhardt and the case is referred forthwith to Department Two with instructions to proceed with the trial.

* * * *

APPENDIX E

[No. D003238. Fourth Dist., Div. One, July 16, 1985.]

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
THE SUPERIOR COURT OF IMPERIAL COUNTY,
Respondent.
MAGGIO, INC.,
Real Party in Interest.

Diana Lyons, Ellen J. Eggers, Daniel A. Garcia, Ira L. Gottlieb and Wendy Sones for Petitioner.

No appearance for Respondent.

Jay W. Jeffcoat, John Allcock, Gray, Cary, Ames & Frye, Ronald H. Barsamian, Larry Dawson and Dressler, Quesenberry, Laws & Barsamian for Real Party in Interest.

OPINION

WIENER, Acting P. J.—This midtrial petition for peremptory writ of mandate seeking to disqualify the trial judge (Lehnhardt) presents the interesting and sensitive question of judicial recusal under newly enacted Code of Civil Procedure sections 170.1-170.5, specifically 170.1, subdivision (a)(6)(C).[1] (Stats. 1984, ch. 1555.) We

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[1] All statutory references are to the Code of Civil Procedure.

Section 170.1, subdivision (a)(6)(C), provides in relevant part as follows: "A judge *shall* be disqualified if any one or more of the following is true: . . . [that] [f]or any reason . . . *a person aware of the facts might reasonably entertain a doubt* that the judge would be able to be impartial." (Italics added.)

say interesting because this proceeding touches upon the core of the judicial process—the appearance of objectivity of the decision maker—requiring a careful balancing of the affected interests. Our decision must consider both the public's right to be assured of the fair, but yet efficient, resolution of disputes and the parties' right to a decision based upon the court's objective evaluation of the facts and law. (See *In re United States* (1st Cir. 1981) 666 F.2d 690, 694.) The tension between the appearance of fairness and efficiency should be self-evident. The difference between the appearance of fairness generally and the perception of fairness as seen by a party or his or her counsel should also be self-evident. With ever-mounting litigation, judicial disqualification will undoubtedly continue to increase since judge shopping before trial is now a way of life. We also suspect that judicial disqualification during trial will increase. This case is not the vehicle either to criticize or to condone such litigation tactics, we understand a particular judge's personality can "make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like." (*Chandler* v. *Judicial Council* (1970) 398 U.S. 74, 137 [26 L.Ed.2d 100, 137-138, 90 S.Ct. 1648] (dis. opn. of Douglas, J.).) Nonetheless the proper performance of judicial duties does not require a judge to withdraw from society and live an ascetic, antiseptic and socially sterile life. Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified. (See *Laird* v. *Tatum* (1972) 409 U.S. 824 [34 L.Ed.2d 50, 93 S.Ct. 7], memorandum of Rehnquist, J. at p. 837.) On the facts of this case, we deny the writ.

I

Maggio, Inc., real party in interest, sued the United Farm Workers of America, AFL-CIO (UFW) for substantial damages arising out of union activity in connection with a strike in early 1979.

The case started March 5, 1985. Four weeks were devoted to jury selection. Counsel energetically conducted voir dire to eliminate those jurors who could not be impartial because of their strike views. Eventually, the parties gave up, waived jury and stipulated on March 27, 1985, to a court trial before Judge Lehnhardt. On May 24, 1985, in what UFW's petition alleges to be "an informal off-the-record conversation," Judge Lehnhardt mentioned to UFW counsel that his wife had volunteered for and worked two to three days as a replacement worker in a carrot shed owned by Maggio.

On May 30, 1985, the UFW moved to disqualify Judge Lehnhardt.[2] The motion recited: "Judge Lehnhardt failed to disclose that his wife had worked as a strikebreaker for the Plaintiff, during the 1979 strike . . . . Said failure to disclose prevented Defendant from exercising an informed CCP § 170.6 peremptory challenge, and caused Defendant to make an uninformed waiver of Defendant's constitutional right to a jury trial. The undisclosed facts, as well as the failure to disclose those facts would cause a person to reasonably entertain a doubt that Judge Lehnhardt would be able to be impartial in this case." The motion attached a "Declaration and Argument of Jay D. Gould," a UFW lawyer, which repeats Judge Lehnhardt's statement and urges disqualification based on Judge Lehnhardt's failure to disclose his wife's activity and the fact of the work itself.

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[2] The papers filed by the UFW were styled a "Petition for Disqualification." To avoid confusion between the petition for writ of mandate which is before us and the petition for disqualification which was before the trial court, we refer to the disqualification petition as a "motion."

Also attached to the motion was a supporting declaration by Cesar Chavez, president of the UFW, who averred he had been told of Mrs. Lehnhardt's work for Maggio and had the union known of this at the commencement of trial, the union would not have waived jury.

Also attached was a joint declaration of 10 persons identifying themselves as farmworkers represented by the UFW, averring they were aware the lawsuit sought money from the UFW because of the 1979 vegetable strike and were aware the UFW allowed Judge Lehnhardt to determine that issue. The declaration then recited: "We have learned that Judge Lehnhardt recently told our attorneys that his wife worked as a strikebreaker for Mr. Maggio during the strike.

"Because Judge Lehnhardt failed to tell us about his wife's employment, and because his wife worked for Mr. Maggio we do not believe that Judge Lehnhardt will be impartial.

"We further believe that if Judge Lehnhardt decides that our Union should pay money to Mr. Maggio, the Judge's decision may be based on his wife's relationship to Maggio.

"We believe that Judge Lehnhardt should have told our attorneys about his wife before the trial started.

"We have spoken to many members of our community and they have expressed the same concern about whether Judge Lehnhardt would be impartial in this case."

Judge Lehnhardt denied the motion and it was therefore referred to Judge Chaille by agreement of the parties. (See § 170.3, subd. (c)(5).) Judge Lehnhardt filed a responsive declaration and answer in which he explained that he had forgotten about his wife's work in Maggio's carrot shed until some testimony at trial regarding replacement workers refreshed his recollection.

Judge Chaille advised the parties the disqualification motion would be decided based "entirely on the declarations submitted by [the UFW] and Judge Lehnhardt." (See generally *Garcia* v. *Superior Court* (1984) 156 Cal. App.3d 670, 677-678 [203 Cal.Rptr. 290], quoting *Bixby* v. *Hotchkis* (1945) 72 Cal.App.2d 368, 373-374 [164 P.2d 808].) He found Mrs. Lehnhardt did work for Maggio for two days in 1979, Judge Lehnhardt had forgotten the incident and, after 32 days of trial, then remembered and called it to the attention of counsel. Judge Chaille concluded: "[T]here is no evidence that Judge Lehnhardt had anything to do with the 2-day work-day [*sic*] of his wife and he knew about it at the time and I fail to see in modern society where this would advocate any impropriety or influence the judge might feel in deciding this case.

"The court specifically finds there is no reason why a person would reasonably entertain a doubt that the judge would be unable to be impartial because six years ago the judge's wife worked for plaintiff for a period of two days." Following Judge Chaille's ruling, the UFW filed this petition for writ of mandate.

II

In 1984, sections 170, 170a and 170.1 regarding disqualifications of judges for bias or cause were replaced by sections 170.1-170.5. (Stats. 1984, ch. 1555.) Support for the newly enacted statute came from the California State Bar whose Committee on Administration of Justice drafted the initial provisions. For the most part, the revision was an effort to clarify and simplify the previous law by adding concepts and language from the Code of Judicial Conduct prepared by a special ABA committee chaired by former Chief Justice Traynor (Traynor Code) in 1972 and adopted by the California Judges Association in 1975.

A

We are unaware of any cases attempting to interpret and apply the new section 170.1. As noted, however, it was based on concepts contained in the Traynor Code which includes a provision analogous to subdivision (a)(6)(C), requiring disqualification of a judge where "his impartiality might reasonably be questioned." (ABA Code of Jud. Conduct, canon 3C.) This objective approach to the question of judicial partiality also served as the genesis for a corresponding federal statute, 28 United States Code Section 455(a) adopted by Congress in 1974, which provides that "[a]ny . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. . . ." (See generally *State of Idaho* v. *Freeman* (D.Idaho 1981) 507 F. Supp. 706, 717-719.)

Section 170, which introduces the disqualification statutes, is a new section expressing the proposition we noted earlier that "[a] judge has a duty to decide any proceeding in which he or she is not disqualified." The legislative history shows this section was prompted by statements suggesting that certain judges did not believe they had such a duty. (See *Olson* v. *Cory* (1980) (27 Cal.3d 532, 576-578 [178 Cal.Rptr. 568, 636 P.2d 532].) Thus, the section serves to remind judges of their duty to hear cases which are controversial and might subject them to public disapproval as well as to protect them from public criticism by a clear statement of their responsibility.

For our purposes, the key change in the new statutes is found in subdivision (a)(6)(C) of section 170.1 which provides for disqualification whenever a judge's impartiality might reasonably be questioned. (*Ante*, fn. 1.) This subdivision changes the law in that the previous corresponding statute, section 170, subdivision (a)(5) (repealed by Stats. 1984, ch. 1555, § 1), which could be read as applying to the appearance of bias, had been construed to require bias in fact. (*Andrews* v. *Agricul-*

tural Labor Relations Bd. (1981) 28 Cal.3d 781, 792-793 [171 Cal.Rptr. 590, 623 P.2d 151].) The reason given for the change is the difficulty in showing that a judge is biased unless the judge so admits. In addition, public perceptions of justice are not furthered when a judge who is reasonably thought to be biased in a matter hears the case.

While the language in the federal statute and the Traynor Code is virtually identical, subdivision (a)(6)(C) is couched in the somewhat different terms of "a person aware of the facts . . . reasonably entertain[ing] . . . doubt[s]" regarding the judge's impartiality. This slightly different gloss on the Traynor Code concept appears to be derived from—or at least closely tracks—interpretive language in a number of federal cases. Illustrative is the Fifth Circuit Court of Appeals' decision in *Potashnick* v. *Port City Const. Co.* (5th Cir. 1980) 609 F.2d 1101, 1111 [54 A.L.R.Fed. 825]: "Use of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." (See also, e.g., *United States* v. *Ferguson* (S.D.N.Y. 1982) 550 F.Supp. 1256, 1260 ("whether a reasonable member of the public at large, aware of all the facts, might fairly question the Court's impartiality"). The language apparently had its genesis in the Reporter's Notes to the Traynor Code. (See Note, *Disqualification of Judges and Justices in the Federal Courts* (1973) 86 Harv.L.Rev. 736, 745.) Thus, absent California precedent on point, we may profitably look to federal cases interpreting section 455(a) for guidance in distilling some basic principles.

The standard for disqualification provided for in subdivision (a)(6)(C) of section 170.1 is fundamentally an objective one. It represents a legislative judgment that due to the sensitivity of the question and inherent difficulties of proof as well as the importance of public confi-

dence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable man would entertain doubts concerning the judge's impartiality, disqualification is mandated. "To ensure that the proceedings appear to the public to be impartial and hence worthy of their confidence, the situation must be viewed through the eyes of the objective person." (*In re United States, supra*, 666 F.2d at p. 694; see also *Matter of Searches Conducted on March 5, 1980* (E.D. Wisc. 1980) 497 F.Supp. 1283, 1290.) While this objective standard clearly indicates that the decision on disqualification not be based on the judge's personal view of his own impartiality,[3] it also suggests that the litigants' necessarily partisan views not provide the applicable frame of reference. (See *United States* v. *Cowden* (1st Cir. 1976) 545 F.2d 257, 265; *Union Independiente* v. *Puerto Rico Legal Services* (D.P.R. 1982) 550 F.Supp. 1109, 1111.) Rather, "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." (*Potashnick* v. *Port City Const. Co., supra*, 609 F.2d at p. 1111; accord *United States* v. *Ferguson, supra*, 550 F.Supp. at p. 1260.)

Various factors may impact on how the "average person on the street" views a judge's participation in a case. One court has perceptively recognized that all other things being equal, the need for disqualification decreases by the extent to which the judge's rulings in the case are limited to purely legal matters. (*State of Idaho* v. *Freeman, supra*, 507 F.Supp. at p. 728.) This is because a trial judge's actual findings are generally accorded considerable deference whereas legal rulings are subject to plenary appellate review. (*Ibid.*; see generally *Hurtado*

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[3] Consistent with this principle, subdivision (c)(5) of section 170.3 provides: "No judge who refuses to recuse himself or herself shall pass upon his or her own disqualification. . . . In every such case, the question of disqualification shall be heard and determined by another judge . . . ."

v. *Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1023-1025 [213 Cal. Rptr. 712].) Equally significant, the circumstances giving rise to suspicions of partiality rarely involve the legal posture of the case.

It is also important to note, especially in the context of the present case, that the facts and circumstances bearing on the judge's possible partiality must be considered as of the time the motion is brought. "The standard . . . is whether a reasonable person knowing all of the facts and looking at the circumstances *at the present time* would question the impartiality of the Court." (*Matter of Searches, supra*, 497 F.Supp. at p. 1291, italics added.)

B

Because the factors in the present case do not point consistently either in favor of or against disqualification, we regard this as a very close issue. On one hand, the circumstances relied upon by the UFW in support of the motion do not involve Judge Lehnhardt directly. Rather, he is suspected because of his wife's activity. Whatever may have been true in years past, it is now simply impossible and unwarranted to treat women as mere shadows of their husbands' identities. Judge Chaille's denial of the disqualification motion was based in large part on his understanding of this fact: "We do not live in colonial days where women's employment is determined by men. . . . [W]omen [do not] have to have the consent of their husbands to do things."

We recognize that other parts of the disqualification statute refer to the involvement of a judge's spouse. But those references are in the context of parties or lawyers in the proceeding (§ 170.1, subds. (a)(4) and (5)), the spouse's financial interests (*id.*, subd. (a)(3)) or the spouse as a material witness (*id.*, subd. (a)(1)). Here the UFW cannot rely on any continuing relationship between Maggio and Mrs. Lenhardt giving rise to any current personal or financial interest which would disqualify

Judge Lehnhardt. Rather, it must necessarily suggest that Mrs. Lehnhardt's willingness to work for two days during the strike would cause a reasonable person to infer that Judge Lehnhardt would either favor Maggio or be biased against the union.[4] This despite the fact there is no evidence that Mrs. Lehnhardt was in any way involved in any of the events at issue in the underlying lawsuit. We will not belabor the tenuousness of the proffered inference.

On the other hand, Judge Lehnhardt is *the* factfinder in the case. His influence is not limited to reviewable legal rulings. He will decide the case. By virtue of his wife's actions, Judge Lehnhardt's experience with the strike was perhaps more personal than others'.[5] It is impossible to say how subtly such an experience might color his view of the facts presented at trial.

C

We are, of course, bound by Judge Chaille's factual findings regarding the circumstances of Judge Lehnhardt's failure to bring the underlying facts to the attention of counsel until nearly two months into the trial. Judge Chaille found that Judge Lehnhardt had forgotten about his wife's work for Maggio and only remembered it when some testimony during the trial refreshed his recollection. We do not doubt the sincerity of the UFW's representations that had it known of Mrs. Lehnhardt's work

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[4] The UFW's characterization of Mrs. Lehnhardt as a "strike-breaker" (*ante*, p. 101) may be intended to suggest something regarding the motivation for her working in Maggio's carrot shed. We wish to emphasize that the record is devoid of any evidence as to what motivated Mrs. Lehnhardt and our resolution of this issue draws no inferences as to why she chose to work for Maggio during the strike.

[5] We qualify this observation by noting that Imperial County is a small, closely knit community economically dependent on agriculture. It may be virtually impossible to find county residents who were not personally affected to a greater or lesser extent by the strike.

before trial, it either would have exercised a section 170.6 peremptory challenge of Judge Lehnhardt or would not have waived its right to a jury.[6] Nonetheless, absent some misconduct on the judge's part which is not present here, such intentions must be deemed irrelevant when the trial is two months old and the disqualification of the trial judge is governed exclusively by sections 170.1 through 170.3. Were the rule otherwise, a party perceiving its fortunes at trial waning might often claim discovery of a fact which changed its perceptions regarding the advisability of peremptorily challenging the trial judge or waiving a jury.

Finally, Judge Lehnhardt's conduct of the trial until now must be considered as evidence of his impartiality.[7] Despite 32 days of administering the proceedings, ruling on objections, etc., the UFW fails to cite a single instance of Judge Lehnhardt's conduct which would support an inference of partiality. (Compare *In re United States*, *supra*, 666 F.2d at p. 697, where a party sought disqualification of a judge for retrial and pointed to specific rulings in the first trial which it suggested were the product of bias.) While it is true that with the enactment of the new section 170.1, a party seeking disqualification no longer need prove the judge is actually biased, we believe that reasonable persons viewing "[all] the circumstances

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[6] As we have note, the partisan litigant emotionally involved in the controversy underlying the lawsuit is not the disinterested objective whose doubts concerning the judge's impartiality provide the governing standard. (*Ante*, p. 104.) For this reason, the farmworkers' declaration expressing concern regarding Judge Lehnhardt, while undoubtedly sincere, is of little persuasive force. In addition, their statements regarding the sentiments of "many members of our community" must be treated as inadmissible hearsay. (*Ibid.*)

[7] We have viewed the economic aspects of the case—in terms of the parties' and court's expenditure of time and resources—as weightless. While the waste of eight trial weeks would be unfortunate, the parties' right to a fair trial cannot be compromised by such considerations.

at the present time" (*ante*, p. 105) would be much less likely to question a judge's impartiality if they knew the judge had already impartially presided over eight weeks of trial. The proof, as they say, is in the pudding.

The petition for mandate is denied.

Butler, J., and Lewis, J., concurred.

Petitioner's application for review by the Supreme Court was denied October 3, 1985. Bird, C. J., did not participate therein.

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

No. 91-154

In The

Supreme Court of the United States

October Term, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

Petitioner,

v.

MAGGIO, INC.,

Respondent.

Petition For A Writ Of Certiorari To The California Court Of Appeal For The Fourth Appellate District

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. After a plaintiff-employer proves that each and every element of its claimed damage was substantially and proximately caused by a labor union's violent and unlawful picketing, does the union then properly have the burden to prove which of the employer's damages, if any, resulted from lawful strike conduct?

2. Does the Supreme Court have jurisdiction to review a decision by an intermediate state appellate court when the highest court of the state denied discretionary review in 1985?

3. Does the denial of a labor union's motion to disqualify a trial judge two months into trial constitute a violation of due process where the sole basis for the disqualification motion was the fact that six years before trial, the trial court judge's wife worked for two days in a carrot shed as a replacement worker and where the labor union has not cited a single instance of bias by the trial judge during the two months of trial?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the California Court of Appeal were the United Farm Workers of America, AFL-CIO and Maggio, Inc.

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No. 91-154

In The

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October Term, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Maggio, Inc. ("Maggio") respectfully submits this Opposition to the Petition for Writ of Certiorari filed by the United Farm Workers of America, AFL-CIO ("UFW"):

OPINION BELOW

The decision of the District Court of Appeal of the State of California, Fourth Appellate District, Division

One, is attached to the UFW's Petition as Appendix B at pages 11a-54a.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people *peaceably* to assemble. . . . (emphasis supplied)

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

JURISDICTION

1. Maggio does not disagree with the UFW's Statement of Jurisdiction as to the first Question Presented.

2. Maggio disagrees with the UFW's Statement of Jurisdiction as to the second Question Presented. The trial judge disqualification issue was the subject of a separate and original writ proceeding resulting in a published decision by the California Court of Appeal in 1985. The UFW's Petition for Review to the California Supreme

Court was also denied in 1985. Supreme Court of the United States, Rule 13 required the UFW to file a Petition for Writ of Certiorari within 90 days of that denial. This Court now has no jurisdiction to entertain this untimely Petition for Writ of Certiorari of the 1985 decision.

INTRODUCTION

The UFW argues that two issues justify a grant of certiorari. However, the record discloses that this was a purely factual dispute over whether there was violence on the picket line, how much and by whom, and what damage it caused. The UFW's Petition is based entirely on its own version of the evidence, not on the version believed by the trier of fact after nearly eleven months of trial.

The UFW's first issue is whether the courts below erred in shifting the burden to the UFW to prove which of Maggio's damages were caused by lawful strike activity as opposed to violent and unlawful activity. The UFW's central premise is that the trial court only required Maggio to show "some" connection between "some" violence and "some" of Maggio's damages. However, that premise grossly misrepresents the record. Substantial evidence supports the trial court's conclusion that the UFW committed repeated and consistent acts of violence during the strike, creating a "climate of violence" throughout the Imperial Valley. The trial court strictly required Maggio to establish a causal nexus between the UFW's violence and each claimed item of damage. Only after Maggio proved that UFW violence was a proximate and substantial cause

of Maggio's damages did the trial court, consistent with decisions of this Court and California courts, shift the burden to the UFW to allocate damages between lawful and unlawful conduct. The UFW expressly recognized in closing argument that it properly had the burden to make this allocation.

The UFW also challenges the California Court of Appeal's refusal to disqualify the trial judge two months into the trial. The motion to disqualify was based on the fact that six years before trial, the judge's wife worked for two days as a replacement worker in a Maggio carrot shed. First, this Court lacks jurisdiction to review this issue. This issue was raised before the California Court of Appeal in a separate and original writ proceeding and was the subject of a published decision. The California Supreme Court denied review on October 3, 1985. The UFW did not timely file a Petition for Writ of Certiorari. Therefore, this issue is not properly now before this Court.

In any event, the UFW's argument on the disqualification issue is purely factual and without merit. In rejecting the UFW's argument that the trial judge should be disqualified, the Court of Appeal applied the identical legal principles cited by the UFW in its Petition for Certiorari. The Court of Appeal merely held that, "on the facts of the case," the trial judge should not be disqualified. Therefore, even if this Court concludes it has jurisdiction to review this issue, certiorari should be denied since the issue is entirely factual.

STATEMENT OF THE CASE

A. Factual Background.

Labor negotiations between the Imperial Valley vegetable industry and the UFW began in late 1978. The UFW Executive Board sanctioned strikes against several growers, including Maggio, in January 1979.

The ensuing strike was bloody and violent. As discussed extensively in the Court of Appeal decision, UFW strikers committed relentless acts of violence that put the Imperial Valley under siege for months. Threats and violence occurred daily and were punctuated by several major confrontations. For example, on January 29, 1979, UFW strikers attacked bus loads of replacement workers, including women and teenagers from the community. Nearly 1,000 strikers threw foot-long chunks of cement through the bus windows, yanking at the doors as the terrified passengers screamed. On February 10, 1979, hundreds of UFW pickets stormed a field, throwing rocks, swinging clubs and using shovels to break bus windows. Two weeks later, 1,000 strikers again stormed a field, attacking replacement workers, buses and Sheriff's deputies with stakes, cement chunks and rocks. Gangs of UFW pickets threatened and attacked replacement workers on an almost daily basis to ensure that crops could not be watered, weeded or harvested. The UFW also had a "phantom crew," a group of young men that worked out of a black van at night. The phantom crew threatened and beat farm workers who dared to cross the picket lines.

The UFW has argued that it preached non-violence. However, despite videotapes of violent incidents clearly

instigated by UFW pickets, the UFW did not remove or discipline a single striker for violence.[1] Rather than make legitimate attempts to control the violence, the UFW condoned, encouraged and rewarded it. When the Imperial County Sheriff again pleaded with the UFW to control the picket lines after the February 10 riot, Cesar Chavez promised that if UFW pickets did not gain access to the fields, the UFW would "saturate Imperial County with more and more people and basically shut down the county's criminal justice system."

B. Procedural Background.

1. Trial Court Proceedings.

On May 9, 1983, Maggio and other growers sued the UFW in the Superior Court of the State of California, County of Imperial, for various torts arising out of violence during the strike. After the longest trial in the county's history, the trial court found by clear, unequivocal and convincing proof that the UFW "authorized, ratified and participated" in regular, consistent and repeated acts of violence from January 29, 1979 through June 30, 1979. The trial court also found that the UFW's "unlawful conduct was a substantial cause of plaintiff's loss materially contributing to plaintiff's injury." The trial court required Maggio to show – and Maggio did show – a causal nexus between UFW violence and each specific claimed item of damage. For example, as to every lost field claimed, Maggio presented detailed testimony about

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[1] Instead, it provided legal counsel and bail for strikers arrested for violence.

circumstances of the field and how the UFW's unlawful conduct made maintenance and harvesting impossible. Maggio also proved that the climate of fear created by the UFW's relentless violence made it nearly impossible to hire replacement workers.[2] After hearing detailed damage evidence, the trial court awarded damages to Maggio of $1,679,453. Judgment was entered on April 16, 1987.

2. California Court of Appeal Proceedings.

On June 15, 1987, the UFW filed a Notice of Appeal to the Court of Appeal for the State of California, Fourth Appellate District, Division One. On February 15, 1991, the Court of Appeal reduced the judgment by $1,011 and otherwise affirmed. The Court of Appeal exhaustively analyzed the lengthy record and each of the UFW's arguments. The court held that each of the trial court's findings was supported by substantial evidence.

3. California Supreme Court Proceedings.

On March 27, 1991, the UFW filed its Petition for Review with the California Supreme Court. That Petition was denied on May 16, 1991.

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[2] The UFW's own testimony proved that the UFW's violence, not union loyalty, made workers reluctant to cross the picket line. UFW Vice President Frank Ortiz testified that farm worker strikes are never successful because growers "always" get replacement workers. The evidence was overwhelming that Maggio's difficulty in hiring replacement workers during this strike resulted from the universal fear created by UFW violence.

4. The UFW Attempts to Stay Execution on the Judgment.

a. The Lower Courts' Decisions.

On June 20, 1991 the trial court denied the UFW's last minute request for a stay of execution on the judgment. The trial court ruled that "it was not reasonably probable that the issues will be considered to be sufficiently meritorious to grant certiorari."

On June 28, 1991, one day before Maggio could execute on the judgment, the UFW filed an "emergency motion" with the California Court of Appeal, requesting a stay of execution on the judgment or, in the alternative, a recall of the remittitur. The Court of Appeal granted a 30-day stay solely and expressly to allow the UFW to seek a further stay from this Court. Rather than do so, the UFW waited nearly the full 30 days and sought a further stay from the Court of Appeal. On July 25, 1991, the Court of Appeal denied the UFW's request for a further stay of execution.

b. Justice O'Connor Denies the UFW's Request for a Stay.

On July 26, 1991, the UFW filed an Application for a Stay of Execution on the Judgment along with its Petition for Writ of Certiorari with this Court. On June 29, 1991, Justice Sandra Day O'Connor denied the UFW's request for a stay of execution on the judgment. At 2:00 p.m., on July 29, 1991, Maggio executed on the entire amount of the judgment plus most of the interest then due.[3]

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[3] Pursuant to court order, the UFW in 1987 had deposited into an account one and a half times the judgment amount to

(Continued on following page)

5. The 1985 Proceedings on the Motion to Disqualify the Trial Judge.

On June 4, 1985, two months after trial began, an independent Superior Court judge denied the UFW's motion to disqualify the trial judge. The UFW contended that the trial judge should be disqualified because six years before the trial, the judge's wife was a replacement worker for two days in a Maggio carrot shed. After the independent trial judge denied the UFW's motion to disqualify, the UFW filed a peremptory writ of mandate to the California Court of Appeal, Fourth Appellate District, Division One. This action was a separate and independent original proceeding. In a published decision, the California Court of Appeal affirmed the denial of the UFW's motion to disqualify. The California Supreme Court denied review on October 3, 1985. The UFW did not file a Petition for Writ of Certiorari within 90 days of that denial as required by the United States Supreme Court Rule 13.

(Continued from previous page)

stay execution on the judgment pending appeal. A check made payable to Maggio was prepared before the UFW received the 30-day limited stay from the California Court of Appeal. After Justice O'Connor denied the UFW's stay request, Maggio cashed this check and so has been paid in full except for the additional 30 days' interest referenced above. It is presently awaiting a check from the UFW for that additional interest.

REASON FOR DENYING THE PETITION

I The UFW's Reargument of the Proximate Causation Evidence Does Not Meet the Supreme Court Rule 10 Standard of Presenting a Special or Important Reason for Review by Writ of Certiorari.

Under Supreme Court Rule 10, this Court grants certiorari "only when there are special and important reasons therefor." This case does not raise important issues of federal law, constitutional or otherwise. Rather, this is a vigorously litigated factual dispute over the UFW's conduct during the 1979 labor strike. Based on eleven months of testimony and demonstrative evidence, the trial court concluded that Maggio established by clear and convincing proof that the UFW ratified, authorized and participated in regular, repeated and consistent acts of violence during the strike. The trial court further concluded that the UFW's violence was a substantial and proximate cause of damages to Maggio totalling $1,679,453.

The trial court's factual findings – affirmed by the California Court of Appeal – result from the trial court's careful evaluation of the testimony, videotapes and other demonstrative evidence. They do not present any legal issue worthy of this Court's review. As this Court said in *Superintendent v. Hill*, 472 U.S. 445, 461 (1985): "We do not grant a certiorari to review evidence and discuss specific facts." It is patently clear that no constitutional principle – whether the First Amendment or the right to strike – permits a labor union to commit violence on the picket line with impunity. Given the factual conclusion of the trial court concerning the UFW's violence, there are no

important federal principles implicated by holding the UFW accountable for the damages caused by its violence.

A. The Decisions Below Do Not Conflict With This Court's Decisions.

This Court has traditionally held that violent conduct committed during a labor strike is "beyond the pale of constitutional protection." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-933 (1982). Moreover, state courts unquestionably have (and must have) the power to compensate victims for damages caused by a labor union's violent torts on the picket line. *United Mine Workers v. Gibbs*, 383 U.S. 715, 730 (1966). Such victims may recover those damages that are " 'directly and proximately caused by wrongful conduct chargeable to defendants . . . as defined by the traditional law of torts . . . " *Id.* at 730.

Here, as noted above, the trial court required Maggio to prove that the UFW's violent conduct substantially and proximately caused each and every element of Maggio's damages. After an exhaustive review of the lengthy record, the California Court of Appeal held that substantial evidence supported the judgment. Thus, the verdict is entirely consistent with the decisions of this Court.[4]

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[4] The UFW's theory, repeated throughout its Petition For Writ of Certiorari, that Maggio was somehow held to a lesser burden of proof is also disproved by the fact that the trial court erroneously required Maggio to establish UFW participation in, or authorization or ratification of, strike violence by the

(Continued on following page)

B. The Decisions Below Do Not Conflict With Other State or Federal Court Decisions.

The UFW urges that the decisions below conflict with other state court and federal court decisions because (according to the UFW) the lower courts awarded damages without proof of proximate causation. The UFW insists – as it has throughout this litigation – that Maggio's losses did not result from strike violence, but rather from UFW's "peaceful picketing."[5] The debate over proximate cause is purely factual and was resolved in Maggio's favor by the trier of fact.

The UFW also asserts, without record citation, that the decisions below were based on "conclusory findings" and that the trial court only found that the UFW's violence substantially caused *some* damage to Maggio. This assertion is patently false. The trial court expressly found that the UFW's violent conduct was a substantial and proximate cause of all damages awarded. The trial court specifically found that the UFW's relentless violence caused all of Maggio's crop loss except for two early

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more stringent "clear, unequivocal and convincing" standard of proof, rather than a mere preponderance of the evidence. Although it did not need to decide the issue, the California Court of Appeal implied that the trial court erred in imposing on Maggio the more stringent standard of proof. *See* Appendix B to Petition, p. 18a, n.6.

[5] This was one of the UFW's major themes at trial and was soundly rejected by the trier of fact.

fields.[6] The court also expressly found that the violence caused Maggio other damage, such as security expenses, alternative housing costs and property damage.

The UFW also argues that in direct contrast to other state court and federal court decisions, the trial court here improperly and prematurely required the UFW to disprove (rather than requiring Maggio to prove) a causal nexus between the violence and each item of claimed loss. However, the record is clear that the trial court did not shift any burden to the UFW until after Maggio had proved that the UFW violence was a substantial and material cause of each item of damage. Both the California Court of Appeal and California Supreme Court correctly rejected the UFW's arguments to the contrary.

1. There is no Conflict Between the Decisions Below and the Ninth and Eleventh Circuit Decisions.

The UFW erroneously asserts that the decisions below conflict with decisions in the Ninth and Eleventh Circuits. However, the California Court of Appeal expressly relied on Ninth Circuit law in affirming the judgment. The Ninth Circuit holds that where the direct cause of loss is not separable between lawful and unlawful activity, the plaintiff may recover for the entire loss if

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[6] That the trial rejected Maggio's claims for these two early fields (which the trial court found were lost because Maggio was not ready for the strike and not because of strike violence) shows that the trial court carefully evaluated each of Maggio's damage claims.

the unlawful conduct was a substantial cause of the damage. *Rainbow Tours, Inc. v. Hawaii Joint Council*, 704 F.2d 1443, 1448 (9th Cir. 1983);[7] *Mead v. Retail Clerks Int. Ass'n, Local 839*, 523 F.2d 1371, 1374 (9th Cir. 1975). Moreover, the Eleventh Circuit in *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985), expressly approved the court's analysis in *Rainbow Tours* and agreed, as both the courts below held, that "only those losses proximately caused by unlawful conduct may be recovered." See *Pantex, supra*, 763 F.2d at 1248-1249. As discussed below, this approach is consistent with *United Mine Workers v. Gibbs, supra*.

Here, the trial court expressly found that the UFW's unlawful conduct was a substantial cause of Maggio's damage. The trial court also concluded by implication that the "climate of violence" created by the UFW during the strike months rendered damages inseparable. As discussed below, the UFW itself acknowledged in closing argument that it properly had the burden to apportion damages between lawful and unlawful conduct. Thus, the

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[7] Interestingly, the UFW asserts that the Court of Appeal decision is in direct conflict with the Ninth Circuit's decision in *Rainbow Tours, Inc. v. Hawaii Joint Council, supra*, 704 F.2d at 1448. However, the Court of Appeal relied on the Ninth Circuit's opinion in *Frito Lay, Inc. v. Local U. No. 137, Intern. Broth.* (9th Cir. 1980), 623 F.2d 1354, 1362-1363, *cert. denied*, 449 U.S. 1013, 1112; see Appendix B at 28a, which was approved by the court in *Rainbow Tours*. Both *Rainbow Tours* and *Frito Lay* hold that where lawful activity is not separable, in determining damages caused by a labor union's unlawful conduct, "general tort principles apply and, therefore, 'substantial cause' does not mean sole or predominate cause, but simply a materially contributing factor." *Id.* at 1448.

case is not inconsistent with Ninth or Eleventh Circuit cases.

2. There is no Conflict Between the Decisions Below and Other State Courts of Last Resort.

The UFW also asserts that the decisions below conflict with decisions of other state courts of last resort because the trial court shifted the burden to the UFW to prove which damages, if any, were caused by the UFW's lawful conduct. However, as discussed above, the trial court shifted the burden only after Maggio proved that its damages were substantially and proximately caused by the UFW's violence. In *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal.App.2d 675 (1964), the jury awarded the employer damages based on the union's tortious picket activity. *Id.* at 686. Like the UFW, the union contended that the plaintiff had not met its burden of proof because the damages were divisible. *Id.* at 703. The basis of this assertion was that the plaintiff's loss was only partially caused by tortious conduct. *Id.* at 704. *Fibreboard* held that after the employer had proven damage from the union's unlawful activity, it was not required to prove non-separability of the damages. *Id.* at 705. Rather, the burden was then on the union to show which damages were caused solely by lawful conduct. *Id.* at 704-705.[8] The trial court here specifically followed

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[8] Were the rule otherwise, labor unions could commit violence on the picket line with impunity as long as they also committed a few interspersed, nonseparable, lawful acts.

(Continued on following page)

Fibreboard and shifted the burden to the UFW only after Maggio proved that violence was a direct, proximate and substantial cause of Maggio's damages.

During closing argument, the UFW freely acknowledged that *Fibreboard* is the law and that the burden of apportionment indeed shifted to the UFW once Maggio proved that violence was a substantial cause of Maggio's damages.[9] This was a significant acknowledgment by the UFW given that its expert economist made absolutely no effort to apportion damages. Notwithstanding this acknowledgment during trial, the UFW then changed its position on appeal and has since argued that *United Mine Workers v. Gibbs, supra,* somehow compels a rejection of *Fibreboard.*

In fact, *Gibbs* and *Fibreboard* are consistent. In *Gibbs,* two days of unlawful strike activity were followed by nine months of peaceful picketing. *Gibbs* merely held that

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(Continued from previous page)

Indeed, labor unions would have a strong incentive to commit violence throughout the strike to increase the difficulty of separating the effects of lawful and unlawful conduct.

[9] The UFW's counsel stated:

> Where it is clear that a defendant has been at fault and that he has caused some part of the plaintiff's damages, the burden of proof should rest upon him, the defendant, to show the extent of his contribution and that, if he cannot sustain it, he should be liable for the entire loss.
>
> And that's our burden in this case. That's what *Fibreboard* says. It shifts the burden so that now we have the burden of going forward and proving an allocation of proportionality.

where the lawful and unlawful conduct are separable, the union is liable only for damages caused by unlawful conduct. However, *Gibbs* acknowledges that liability for all damages caused by unlawful strike activity is proper where the results of peaceful and violent conduct are not separable. Here, the Court of Appeal correctly concluded that a finding of inseparability was implicit in the trial court's ruling.[10] *See Maggio, Inc. v. United Farm Workers*, 227 Cal.App.3d 847, 867 n. 14 (1991). (Appendix B, p.28a)

To the extent that the UFW is simply urging that *Gibbs* requires a direct and proximate relationship between unlawful conduct and the claimed damages, the trial court expressly found such a relationship in this case. Having acknowledged that *Fibreboard* is the law,[11] and having failed to even attempt to meet its burden under *Fibreboard*, the UFW is hardly in a position to urge this Court to devote its scarce resources to reviewing this issue.

The UFW also argues that the trial courts' "premature" shifting of the burden of proof to the UFW conflicts with the highest state court decisions in Connecticut and Pennsylvania. *See United Aircraft Corp. v. Int'l. Ass'n. of Machinists, et al.*, 161 Conn. 79, 285 A.2d 330 (1971), *cert.*

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[10] The UFW pickets committed violence throughout the many months of the strike both in major confrontations and on a daily basis, creating what the trial court called a "climate of violence." The constant violence was plainly inseparable from whatever lawful picketing also occurred during the same time.

[11] Any argument that *Fibreboard* is no longer good law in California is belied by *Haft v. Lone Palm Hotel*, 3 Cal.3d 756, 754 (1970), a post-*Gibbs* California Supreme Court decision that cites *Fibreboard* with approval.

denied, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976); *Stryjewski v. Local Union No. 830*, 451 Pa. 550, 304 A.2d 463 (1973). However, both these decisions merely illustrate the application of the legal principles outlined above to the facts of the particular case.

For example, in *United Aircraft Corp.*, the Connecticut Supreme Court merely followed *Gibbs*. The court expressly held that the trial court:

> [O]nly had to determine what damage resulted from the tortious acts [of the union]. . . . Whenever loss results to a party naturally and directly from the tortious or illegal act of another, the loss is the proper subject of judicial relief by compensation in damages. [citations omitted]. . . . There must be a causal relation established between the tort and the damage sustained. . . . [T]he basic aim is to compensate the plaintiff for the loss caused by the tortious conduct so far as money can do so.

United Aircraft Corp., 285 A.2d at 344. The court decided *on the facts of that case*, that the burden of proving which damages were caused by the union's lawful activities would not be shifted to the union *until* plaintiff met its burden of proof. *Id.* at 342. Here, in contrast, the trial court concluded based on substantial evidence that Maggio clearly met its burden of proof.

Similarly, *Stryjewski v. Local Union No. 830, supra*, is distinguishable on its facts. The court there held that the plaintiff-employer failed to meet its initial burden of proving a causal nexus between the strikers' illegal picketing and the plaintiff's damages. In fact, in contrast to

this case, the record in *Stryjewsky* was devoid of any specific factual findings that revealed 1) the "duration and severity" of the strikers' illegal conduct; 2) how damages were calculated or apportioned; and 3) the specific injuries sustained by the plaintiff. *See Stryjewski*, 304 A.2d at 554. To the extent that *Stryjewski* requires a plaintiff to prove that its damages resulted *solely* from unlawful picketing, the case is an aberration.

II This Court Has No Jurisdiction to Review the Issue Concerning Disqualification of the Trial Judge.

The UFW asserts that this Court should review a California Court of Appeal decision which was presented in an entirely separate and original writ proceeding when the California Supreme Court denied review almost six years ago, on October 3, 1985. However, United States Supreme Court Rule 13 provides:

> A petition for writ of certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed *in time* when it is filed with the Clerk within *90 days* after the entry of the order denying discretionary review. (emphasis supplied.)

Here, the UFW did not file its Petition for Writ of Certiorari within 90 days of the California Supreme Court's denial of its Petition.

An untimely filing of a Petition for Writ of Certiorari mandates that this Court deny certiorari because it lacks

the necessary jurisdiction. *See* 28 U.S.C. § 2101(c); *Department of Banking v. Pink*, 317 U.S. 264 (1942); Supreme Court Rule 13(3) ("The Clerk will refuse to receive any petitions for a writ of certiorari which is jurisdictionally out of time.") Thus, certiorari should be denied on this issue.

III Even on the Merits, the Disqualification Issue Does Not Warrant Supreme Court Review.

After two months of trial, the UFW moved to disqualify the trial judge because six years before the trial, the trial judge's wife, Mrs. Lehnhardt, worked in a Maggio carrot shed for two days as a replacement worker. The trial judge himself had no direct association, pecuniary or otherwise, with Maggio. The UFW attempted to create the inference that Mrs. Lehnhardt's two days in the carrot shed established that she was anti-union and that Judge Lehnhardt, therefore, must be anti-union as well. However, as emphasized in the Court of Appeal decision, the UFW did not cite to a single instance during the two months of trial where Judge Lenhardt had exhibited any bias in Maggio's favor.[12] Even now, the UFW points to no

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[12] Indeed, a review of the record reveals that Judge Lenhardt was extremely accommodating to the UFW and gave it every conceivable opportunity to prove its case. The trial court required Maggio to prove an extremely strict nexus between UFW violence and Maggio's claimed damages. As discussed above, the trial court also improperly required Maggio to meet the stricter "clear and convincing proof" standard in establishing the UFW's liability for strike violence. These are hardly the actions of a trial judge who is biased against labor unions.

instance of bias except (from the UFW's viewpoint) the trial court's verdict in Maggio's favor. Of course, the Court of Appeal independently determined that the verdict was based on substantial evidence.

In any event, the premise of the UFW's disqualification motion was that Mrs. Lehnhardt must have been reflecting some anti-labor union views of her husband when she worked for two days in the Maggio carrot shed. However, as the Court of Appeal pointed out, a woman is no longer merely a reflection of her husband's views and opinions. Mrs. Lehnhardt needed neither her husband's permission nor blessing to work in the carrot shed. Her autonomy – along with the remote and brief nature of her work and Judge Lehnhardt's exemplary conduct during the two months of trial – all properly led the Court of Appeal to affirm the denial of the motion to disqualify. That affirmance presents no issue that merits review by this Court.

CONCLUSION

The UFW does not raise a single issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the petition for writ of certiorari.

Dated: August 23, 1991

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Supreme Court, U.S.
FILED
SEP 3 1991
OFFICE OF THE CLERK

No. 91-154

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UNITED FARM WORKERS OF AMERICA, AFL-CIO,
Petitioner,
v.
MAGGIO, INC.,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

PETITIONER'S REPLY BRIEF

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Constitution of the United States:

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PETITIONER'S REPLY BRIEF

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1. Respondent's Brief in Opposition seeks to obscure the fundamental constitutional error in the lower court opinions by rewriting those opinions. Respondent asserts without any support that "the trial court strictly required Maggio to establish a causal nexus between the UFW's violence and each claimed item of damage." Opp. Br. at 3. Respondent also asserts, again without any citation to the record or the decisions below, that the lower courts found that "the UFW's violent conduct substantially and proximately caused each and every element of Maggio's damages." *Id.* at 11.

The trial court's own statement of its decision is *directly contrary* to respondent's assertions. In Paragraph 8 of the decision that court stated that, although the Union's unlawful picketing was "a substantial cause" of respondent's damages during the strike, "it was not the

sole cause." Pet. App. at 3a. In Paragraph 10, the trial court found *only* that "all of the crop loss" for which damages were awarded "was substantially caused by the defendant." In that paragraph, there was not even a finding that *any* of the loss was the result of *unlawful* activity as opposed to lawful picketing. *Id.* at 4a.

Taken together, these findings necessarily entail the conclusion that, in addition to unlawful activity, there was other, lawful picketing activity that contributed to respondent's losses. Nontheless, and contrary to respondent's representations, the trial court did *not* require respondent to show that it was the *unlawful* conduct that "proximately caused each and every element of Maggio's damages." Opp. Br. at 11.[1] Instead, once it found that the unlawful activity was "a substantial cause of [respondent's] damage," the trial court *shifted to the Union the burden of showing* "the extent of its contribution to [respondent's] damages, i.e., [to] distinguish the damages caused [by] lawful conduct from the damages caused by unlawful conduct." Pet. App. at 5a-6a.

In upholding the trial court, the court of appeal, too, reasoned that respondent was required *only* to show that unlawful union conduct was *a* cause of "*some* part of [respondent's] damages." Pet. App. 26a (emphasis added). That court then concluded that the Union would be liable for the entire amount of respondent's strike losses, whether due to lawful or unlawful conduct, unless the Union could "bear the burden of segregating damages." *Id.*

In sum, respondent has plainly misstated what the lower courts did in order to avoid confronting the significant legal errors made by those courts.

2. Contrary to respondent's argument, the dispute over the lower courts' rulings in this case is *not* a dispute

[1] Indeed, nowhere in its decisions did the trial court make *any* evidentiary findings concerning any particular acts of misconduct, nor did that court make *any* findings as to how any particular act contributed to any of respondent's losses.

concerning the weight or sufficiency of the evidence. The Union had the First Amendment right to publicize its strike; to seek support for its strike through picketing and other peaceful means; and thereby *lawfully* to cause all of the economic losses that respondent suffered due to its failure to harvest its crops. It is for that reason that the Constitution imposes a heavy evidentiary burden on an employer who seeks to recover damages for the consequences of unlawful activity during the course of otherwise lawful picketing. *See NAACP v. Claiborne Hardware*, 458 U.S. 886, 933-34 (1982); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Moreover, this Court's cases make equally clear that, as a matter of constitutional principle, First Amendment rights may *not* be defeated by "insubstantial findings of fact screening reality." *Claiborne Hardware*, 458 U.S. at 923-24 (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)). Trial courts must support their decisions with findings sufficient to identify the precise impact of unlawful conduct and to make clear that state power is *not* being applied to compensate "for the consequences of nonviolent, protected activity." *Claiborne Hardware*, 458 U.S. at 918.

Had these constitutional standards been adhered to in this case, respondent would have been required to adduce specific and substantial proof that replacement workers did not come to work out of fear of unlawful coercion, and that their failure to report to work out of fear was the reason for the employer's losses. And the trial court would have been required to set forth findings sufficient to demonstrate that First Amendment freedoms were not themselves being burdened.[2]

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[2] *See e.g., United Aircraft Corp. v. Intl. Assn. of Machinists*, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972), *on appeal following remand*, 169 Conn. 473, 363 A.2d 1068 (1975), *cert. denied*, 425 U.S. 973 (1976) (court took or reviewed testimony

Instead, the lower courts in this case made no detailed evidentiary findings whatsoever, and stated in the most conclusory fashion only that "*some* violence and public disorder" occurred. Having done that much—which as a matter of this Court's teaching is not enough—the lower courts then placed the burden on the Union to prove that respondent's strike damages were *not* the result of unlawful activity.

By so doing, the lower courts entirely ignored the constitutional requirements that this Court has imposed in order to protect First Amendment freedoms. The result was to permit respondent to secure damages for the consequences of *constitutionally protected activity*, and to enter a ruinous judgment that all but destroys the farmworkers union. This result requires this Court's review.

3. To be sure, at certain points in its Brief in Opposition, respondent pays lip service to the standards this Court has put in place to protect First Amendment rights in cases in which the conduct in question involves both constitutionally protected and unprotected activity. By claiming that in fact the lower courts placed the burden on the plaintiff-employer to show that the Union's unlawful conduct "proximately caused each and every element of Maggio's damages," respondent implicitly acknowledges that, in cases involving tortious conduct that occurs in the course of constitutionally protected activity, the plaintiff must meet a *heightened burden* of "demonstrating that fear rather than protected conduct" was the dominant cause of all of its damages. *Claiborne Hardware*, 458 U.S. at 932.

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from more than 200 employees concerning their reasons for being absent from work during a strike, and on the basis of that evidence calculated the employer's damages due to tortious conduct during the strike as a percentage of the total strike damages; court then set forth its findings in 401 separate paragraphs covering 109 pages).

At other points, however, respondent, relying on *Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, 227 Cal. App. 2d 675 (1964), argues that it was proper to apply ordinary tort adjudication principles, and to shift to the Union the burden of separating the consequences of lawful and unlawful activity merely upon a showing by the employer that unlawful conduct was "a" cause of "some part of the employer's damages." *See* Opp. Br. at 15-16; Pet. App. 25a-26a (quoting *Fibreboard*, 227 Cal. App. 2d at 704-05).

Because the lower courts quite clearly took that approach in this case, and because that approach is directly contrary to *Claiborne Hardware* and *Gibbs*, respondent's attempt to harmonize the decisions below with this Court's cases is unavailing.[3]

4. Respondent, moreover, *concedes* that the judgment below conflicts with the decision of the Pennsylvania Supreme Court in *Stryjewski v. Local 830, Brewery Drivers*, 451 Pa. 550, 304 A.2d 463, 466 (1973), in which the court required that the employer's damages, "to be constitutionally compensable, result[] *solely* from unlawful and violent activities, which are without protection of the first amendment." Opp. Br. at 18-19. And, as we show in the margin, respondent's efforts to explain away the conflict between the judgment below and the decisions of the

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[3] Respondent suggests (Opp. Br. at 16-17) that in the trial court the Union somehow waived or conceded away the argument that the court's allocation of the burden of proof was constitutionally improper. The state court of appeal, however, clearly found that the constitutional question raised by the burden of proof allocation was properly before it, and court of appeal squarely decided that question on the merits. *See* Pet. App. at 25a-27a; Cert. Petition at 7 n.6. When a state appellate court finds that a federal question is properly before it and then decides that question, this Court concludes that the federal question was timely and properly raised. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

other state and federal courts discussed in the *certiorari* petition are unsuccessful.[4]

5. Finally, respondent contends that the second question presented in the *certiorari* petition is untimely raised, and that the Union should have sought this Court's review within 90 days of the state court's denial of a writ of mandamus to disqualify the trial judge in 1985. The Union, however, is not seeking review of the 1985 original writ proceeding. Rather, we are seeking review of the significant due process violation that occurred in the case on the merits. That violation was occasioned by the trial judge's decision to preside over respondent's suit against the Union even though the judge's wife worked for respondent as a replacement worker in the very strike at issue in the case, in which respondent sought damages

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[4] Contrary to respondent's assertion, in *United Aircraft Corp. v. Intl. Assn. of Machinists*, the state court rejected the argument that once an employer meets ordinary tort causation standards, "the burden was on [the defendant-union] to establish the allocation of losses between peaceful strike activity and unlawful strike activity." 285 A.2d at 342. And the *United Aircraft* court also made clear that it would reject the trial court's conclusory "findings" in this case as a basis for awarding damages during the course of otherwise lawful picketing. 363 A.2d at 1071. *See* Cert. Pet. at 17-19.

Similarly, respondent is wrong in stating that there is no conflict between the judgment below and the decisions in *Rainbow Tours, Inc. v. Hawaii Joint Council*, 704 F.2d 1443 (9th Cir. 1983) and *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985). Although those decisions recognize that there may be circumstances in which damages flowing from lawful persuasive conduct may not be "separable" from damages due to unlawful coercion, both make clear that the burden of demonstrating inseparability is at all times on the employer, and that a conclusion of inseparability must be supported by careful findings of fact. Thus, even where some violence occurs during the course of lawful picketing, the employer may not recover *any* damages under these decisions unless the employer can show that employees stayed away from work out of fear of violence, and not out of "union principle." *See* Cert. Pet. at 19-20.

None of the courts deciding these cases would have accepted the decisions below as a basis for the damage award against the Union in this case.

against the Union primarily for alleged unlawful coercion directed against the replacements.

The judge's failure to recuse himself in these circumstances raises significant due process issues under this Court's decisions, and infected the entire case on the merits. But there was no basis and no occasion for seeking review of that issue until termination of the case on the merits, and the second question presented is therefore properly before the Court.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

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